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Analysis of the legal, theoretical, and practical implications---Rumsfeld v Fair

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ANALYSIS OF THE LEGAL, THEORETICAL, AND PRACTICAL IMPLICATIONS – RUMSFELD v. FAIR

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ABSTRACT

Analysis of the Legal, Theoretical, and Practical Implications – Rumsfeld v. FAIR

by

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Congress has the power under Article 1 of the United States Constitution to "raise and support armies" and deems military recruiting on college campuses necessary for military preparedness and providing for the national defense. The Solomon Amendment was passed in 1994 and conditions the receipt of federal funds on access to college and universities for the purpose of military recruiting. This condition of federal funds led several law schools and faculty to bring suit against the Secretary of Defense claiming the Solomon Amendment violated their First Amendment rights. This case was heard in December 2005 and was ruled upon in March 2006 with a unanimous decision from the Supreme Court of the United States in support of the government's position.

The purpose of this study was to provide a historical case study, perform an analysis of the *Rumsfeld* decision on a micro and macro level and offer guidelines for college and university administrators in developing policies and procedures impacted by the Solomon Amendment. The historical case study provided the legislative and litigation

history of the Solomon Amendment, from its enactment to appeal, to the Supreme Court, and its opinion.

The micro legal analysis utilized the judicial decision-making template crafted by Judge Benjamin N. Cardozo in his text "The Nature of the Judicial Process." Cardozo advocates a method for addressing the judicial decision-making process that was applied to the opinion written by Chief Justice Roberts to determine whether the Chief Justice's decision making, in this case, conforms to the template proposed by Cardozo.

The macro legal analysis utilized the lens provided by legal scholar Jeffrey Rosen to determine if the decision in *Rumsfeld* supported or refuted Rosen's theory of the Supreme Court. Jeffrey Rosen in his text "The Most Democratic Branch" presents a thesis regarding the role of the Supreme Court in our governance system and how the Supreme Court can maintain its independence.

Analysis of the decision found that Chief Justice Roberts utilized the teachings and judicial decision-making template offered by Judge Benjamin Cardozo. The decision in *Rumsfeld v. FAIR* also supported the theory offered by Jeffrey Rosen. This study provided analysis of guidelines from the National Association of Law Placement (NALP) and the American Association of Collegiate Registrars and Admissions Officers (AACRAO). This study also provided guidelines for college and university administrators in developing policies and procedures impacted by the Solomon Amendment.

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CHAPTER I

INTRODUCTION

Overview

Congress has the power under Article 1 of the United States Constitution to "raise and support armies..." and military recruiting on college campuses is one mechanism used to implement Congress's Constitutional authority.[1] Article 1 also provides Congress the authority to utilize federal funds for the common welfare of the United States.[2]

In 1990 the American Association of Law Schools (AALS) voted to include sexual orientation as a protected category in law school non-discrimination policies. This vote required its members to withhold placement assistance or use of the schools facilities from employers who discriminated on the basis of sexual orientation.[3]

"Don't Ask, Don't Tell" is the popular name for Pub. L. 103-160 (10 U.S.C. § 654) which prohibits anyone who has sexual bodily or romantic contact with a person of the same sex from serving in the United States military. This law also prohibits any homosexual or bisexual from disclosing their sexual orientation or from speaking about

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[1] U.S. Constitution, Art. 1, Sec. 8 – "To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two years; To provide and maintain a Navy;

[2] The U.S. Constitution Online, http://www.usconstitution.net/const.html#A1Sec8 (accessed April 2, 2007)

[3] Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 04-1152, http://www.law.cornell.edu/supct/cert/04-1152.html (accessed January 22, 2006)

any homosexual relationships while serving in the United States military. President Bill Clinton signed this legislation into law in 1993.[4]

In 1994, a study requested by Congress "found 140 institutions of higher education that, for some reason or another, whatever reason, have denied [military] recruiters access to their campuses."[5] This denial could be explained by law schools adopting the AALS non-discrimination policy of refusing placement assistance and use of facilities to employers who discriminate on the basis of sexual orientation.

Gerald Solomon was a Republican and was first elected to the House of Representatives (House) in 1978 and served until his retirement in 1998. As a veteran of the U.S. Marine Corps, he was a staunch advocate for veteran's affairs and the men and women of the United States military. For example, he was the chief sponsor of an unsuccessful amendment to the U.S. Constitution to prohibit the burning of the American Flag. During his twenty-year congressional career, Gerald Solomon achieved the Chairmanship of the Rules Committee.[6]

During the second session of the 103d Congress, Representative Solomon, N.Y. offered a floor amendment to the National Defense Authorization Act for Fiscal Year 1995 that would deny Department of Defense (DoD) funds to "an institution which prohibits or in effect prevents the military access to directory information pertaining to students for the purpose of military recruiting." The House accepted the amendment and

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[4] Don't Ask, Don't Tell, Don't Pursue, http://dont.stanford.edu/ (accessed January 22, 2006)

[5] 140 Cong. Rec., S8172 (daily ed. July 1, 1994) (Sen. Nickles); Nickles Amendment No. 2148.

[6] Gerald Solomon, US Representative, 71, http://slick.org/deathwatch/mailarchive/msg00372.html (accessed January 23, 2006)

it was included in the final bill.[7] The floor amendment accepted by the House became known as the "Solomon Amendment" and was co-sponsored by Representative Richard Pombo, CA. who declared an intention to "send a message over the wall of the ivory tower of higher education" and that "starry-eyed idealism comes with a price."[8]

The "Solomon Amendment" as proposed in 1994 denied Department of Defense funding from any institution of higher education that denied "entry to campuses or access to students on campuses; or access to directory information pertaining to students" Directory information consisted of: name, address, telephone listing, date and place of birth, level of education, degrees received and the most recent previous institution the student attended. The Solomon Amendment was signed into law in 1995 by President Bill Clinton.[9]

In 1997 Congress amended the Solomon Amendment authorizing the withholding of federal funds associated with other federal agencies in addition to the Department of Defense. Schools that prohibited or prevented access to directory information or entry to campus to access students would lose funds from the Department of Defense, Transportation, Labor, Health and Human Services and Education.[10] In October 1999, legislation introduced by Rep. Barney Frank removed financial aid funds from the federal

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[7] *National Defense Authorization Act for Fiscal Year 1995*, Public Law 103-337, § 558, U.S. Statutes at Large 108 2663, 2776 (1994)

[8] Dahlia Lithwick, *Law Schools Against Free Speech: The Supreme Court Considers Military Recruitment on Campus*, http://www.slate.com/id/2131643/ (accessed January 23, 2006)

[9] SolomonResponse.Org, http://www.law.georgetown.edu/solomon/solomon.html (accessed January 23, 2006)

[10] SolomonResponse.Org, http://www.law.georgetown.edu/solomon/solomon.html (accessed January 23, 2006)

monies potentially affected by the Solomon Amendment.[11] Although student financial aid was removed from possible financial loss, most institutions decided that the potential loss of federal funds was too great a risk and provided the military access to their student directory information and to their campuses.

Prior to January 2000 the interpretation of the Solomon Amendment restrictions only pertained to a particular school within the parent higher education institution. If the law school of a particular institution decided to not provide access to directory information or restrict military recruiters, then the specific school would be subject to the penalties of the Solomon Amendment and lose funding.

In 2000, the Solomon Amendment was clarified to deny funds to all parts of the higher education institution. After the clarification, if a Law School decided to restrict military recruiter access then the parent institution would suffer the financial loss of federal funds. It was estimated that Yale University could lose $300 million annually in federal funding should it bar military recruiters from its campus.[12]

In an effort to abide by the Solomon Amendment and uphold their non-discrimination policies as member institutions of the AALS, most Law Schools attempted to balance the requirements of both. Military recruiters were allowed access to another part of campus rather than the law school itself and the law school's career placement services were not used to announce and conduct interviews. This attempt at balance came to an end in 2001 when military departments began to put colleges and universities

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[11] Solomon Amendment, http://www.yalerotc.org/Solomon.html (accessed January 23, 2006)

[12] Alice Gomstyn, *Military Recruiting Goes to Court: Law Professors and students file multiple lawsuits seeking to uphold antidiscrimination policies*, http://chronicle.com/prm/weekly/v50/i16/16a01701.htm (accessed January 23, 2006)

on notice of non-compliance in accordance to the Solomon Amendment requirements. The measures taken by many law schools who attempted to strike a balance between compliance and their non-discrimination policies was no longer satisfactory.[13]

In 2001 Yale University Law School received notification from the DoD that their attempts at compromise were no longer satisfactory. Yale University Law School was allowing recruiters to visit the campus, access student information, and use law school classrooms for informational meetings when requested by students. Students could reserve rooms for interviews and employees of the University were used to assist in scheduling meetings off campus.

In December 2001 the DoD indicated that this arrangement was not in compliance with the requirements of the Solomon Amendment. The DoD's position was the Solomon Amendment required college and universities to provide the same quality of services offered to other recruiters admitted to campus.[14] If other recruiters were allowed to interview on campus and use the law school's career placement services, then military recruiters should receive the same level of service.

Higher education institutions were attempting to balance their policies and principles with the requirements of the law and this was no longer acceptable. Military recruiters not only required access, but demanded the same level of service provided to nondiscriminatory employers. Some higher education institutions argued that they were being coerced to use their resources to support the discriminatory message of the military.

In September 2003, a lawsuit was filed by the Forum for Academic and Institutional Rights (FAIR). FAIR consisted of 25 law schools, the Society of American

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[13] FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 282 (D.N.J. 2003).

[14] Scott D. Gerber, *Allow Military Recruitment on Campus*, N.J. L.J., Dec. 29, 2003.

Law Teachers, the Coalition for Equality, the Rutgers Gay and Lesbian Caucus and other individual students and professors.[15] FAIR's founder and president is Mr. Kent Greenfield, professor, Boston College Law School. The mission of the organization is "to promote academic freedom and to support educational institutions in opposing discrimination."[16] The organization was created to fight the Solomon Amendment and this lawsuit was its first project.

FAIR claimed the Solomon Amendment violated the First Amendment. They argued that the Amendment compelled higher education institutions to use their resources to propagate a discriminatory message in violation of the policies and procedures of the institution. In addition, they argued the law imposed conditions on funding should a higher education institution refuse to propagate the discriminatory message.

In November 2003 the United States District Court refused to issue an injunction prohibiting enforcement of the Solomon Amendment. The District Court's denial was based on the rationale that the "Solomon Amendment encroached on First Amendment interests, but such interests are outweighed by the government's interest in recruiting."[17] FAIR appealed to the Third Circuit Court of Appeals.

In November 2004, the Third Circuit Court ruled in favor of FAIR. In a 2-1 decision, the Court decided FAIR demonstrated a "likelihood of success on the merits of

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[15] Andrea L. Foster, *Justice Dept. Seeks Review of Ruling on Recruiters*, http://chronicle.com/weekly/v51/i21/21a02502.htm (accessed January 24, 2006)

[16] SolomonResponse.Org, Forum for Academic and Institutional Rights, http://www.law.georgetown.edu/solomon/joinFAIR.html (accessed January 24, 2006)

[17] Plaintiffs' Motion for a Preliminary Injunction, http://www.law.georgetown.edu/solomon/documents/Liflandopinionpt2.pdf (accessed January 24, 2006)

its First Amendment claims..."[18] With this decision a preliminary injunction was ordered and the Solomon Amendment was deemed unconstitutional.

On February 28, 2005 the United States Government petitioned the U.S. Supreme Court for a Writ of Certiorari. The questions presented by the Department of Justice for Donald H. Rumsfeld, Secretary of Defense, et al. were whether the court of appeals erred in holding that the Solomon Amendment violated the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.[19]

Brief of Respondents, Forum for Academic and Institutional Rights, Inc., et al. in opposition to the Petitioners was filed on March 30, 2005 and the reply of Petitioners Donald H. Rumsfeld, Secretary of Defense, et al. was filed on April 15, 2005. The United States Supreme Court granted certiorari on May 2, 2005. Petitioner's brief on the merits was filed on July 15, 2005 with the reply from the Respondents filed on September 21, 2005. Twenty-seven *Amicus Curiae* briefs were filed, twelve in support of the Petitioners, thirteen in support of the Respondents, and two in support of neither party. With this groundwork set, The Supreme Court heard Oral Arguments on December 6, 2005.[20]

Research Problem

The Supreme Court occupies an influential and sometimes controversial position in the structure of the American democracy. It has the ever-changing and challenging position of interpreting the Constitution for the current populace and while doing so it is

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[18] SolomonResponse.Org, http://www.law.georgetown.edu/solomon/amendment_enjoined.htm (accessed January 2, 2006)

[19] 04-1152 Rumsfeld, et al. v. Forum for Academic and Institutional Rights, et al., Questions Presented, http://www.supremecourtus.gov/qp/04-01152qp.pdf (accessed January 24, 2006)

[20] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

setting legal precedents for future legal battles. There have been questions of the Supreme Court's legitimacy in reviewing the other branches of government and how the institution can best serve the rights of the American people. There is quite the balancing act required to protect individualism and to also be consistent with the values and wishes of the norm in an effort to give meaning to the nation's democratic values. Gathering insight and understanding of the judicial process is essential to participating fully in this American democracy. A historical case study of the *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR) case will further the goal of understanding the judicial process.

Legal scholars have investigated many aspects of the Supreme Court from its legitimacy to how judges make decisions, and whether the political arena has an effect on the rulings of the Supreme Court. *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR) offers an opportunity to assess the judicial decision-making of the current Chief Justice and to test a theory of the role of the Court in our governance system offered by Professor Jeffrey Rosen.

As higher education administrators it is essential to be well versed in the workings of the law and how law can potentially affect the operations of an institution. A study focused on understanding the decision upholding the constitutionality of the Solomon Amendment is essential for university administrators charged with developing policies, procedures and operations that comply with the legislation and also serve the university community. Knowledge of the parameters and implications associated with the Solomon Amendment will help administrators avoid criticism, complaints and possible future litigation.

Research Questions

1. How did the U.S. Supreme Court resolve the dispute regarding the First Amendment challenges in the Rumsfeld case?
2. What were the major arguments in the judicial process that influenced the U.S. Supreme Court's decision?
3. Does the opinion of Chief Justice Roberts' indicate that he has used or uses the judicial decision-making template proposed by Judge Benjamin Cardozo?
4. Does the decision support or refute the theory of Jeffrey Rosen regarding the role of the Supreme Court in our governance system?
5. What implications does the decision have on college and university policies, procedures and operations?
6. What new questions or issues emerged from this decision?

Methodology

The purpose of this study was to analyze the Supreme Court Decision in *Donald H. Rumsfeld, Secretary of Defense, et al., v. Forum for Academic and Institutional Rights, Inc., et al.* Legal Research methodology provided the foundation for the analysis. This is a qualitative study that used case study and historical legal research methods. The researcher "is interested in understanding how participants make meaning of a situation or phenomenon, this meaning is mediated through the researcher as instrument, the strategy is inductive, and the outcome is descriptive."[21] The researcher collected data through document analysis and inductively analyzed the data.

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[21] Sharan B. Merriam, (2002). *Qualitative research in practice: examples for discussion and analysis*, 1st ed. (San Francisco: Jossey-Bass higher and adult education series, 2002), 6.

The case study is "an intensive description and analysis of a phenomenon or social unit such as an individual, group, institution, or community." This approach "seeks to describe the phenomenon in depth."[22] A single case study can be "the basis for significant explanations and generalizations."[23] "The purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts."[24] In this study traditional methods of legal research will be employed. Relevant case history, Constitutional amendments, federal acts, state statutes, rules and regulations will be identified. An internal and external evaluation will be performed. An "internal evaluation involves reading the particular legal authority you have found and determining whether, on its own terms, it applies to the fact situation in your research problem."[25] An external evaluation requires the researcher to "determine the current status (i.e., validity) of the authority."[26]

The legal research included case analysis of all Solomon Amendment briefs, petitions, *Amicus Curiae* briefs, Oral Arguments, and all pertinent court cases. Legal content analysis of the Solomon Amendment decision will be performed to assess the practical implications of the decision. This researcher attended the Oral Arguments before the United States Supreme Court, which provided a personal perspective on the proceedings.

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[22] Merriam, *Qualitative research in practice: examples for discussion and analysis*, 8.

[23] Robert K. Yin, *Case Study Research: design and methods*, 3rd ed. (Thousand Oaks: Sage Publications, Inc. 2002), 4.

[24] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis*, 2nd ed. (Madison: Legal Education Publishing, 1986), 29.

[25] Wren and Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis*, 79.

[26] Wren and Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis*, 89.

Further analysis of the decision will be performed using the theoretical perspectives of two legal scholars to provide insight and a perspective on Chief Justice Roberts' decision-making process and test the theory presented by Jeffrey Rosen. The theories of Cardozo and Rosen were used as micro and macro lenses, respectively, to view and interpret the unanimous decision of the Supreme Court of the United States.

The micro legal analysis will be performed through the lens provided by Judge Benjamin Cardozo. Judge Benjamin Cardozo is considered one of the greatest American jurists and his landmark text "The Nature of the Judicial Process" is a booklet on judicial decision-making. This text was published in 1921 and still exerts influence among legal scholars and remains valuable to judges and students of law. Cardozo advocates a method for addressing the judicial decision-making process, which will be applied to the opinion delivered by Chief Justice Roberts. The method identifies four sources of information that the judge uses for guidance in the judicial decision-making process. The sources of information are *Philosophy*, *Evolution*, *Tradition*, and *Sociology*. *Philosophy* examines the logical progression of a principle in the judicial decision-making process. *Evolution* examines a line of historical development of a principle. *Tradition* examines the customs of the community and *Sociology* balances and moderates the other sources of information in the judicial decision-making process. This micro legal analysis will determine if the Chief Justice approaches dispute resolution consistent with the teachings presented by Cardozo and also offer hints on how the Court may approach and rule on future cases. This will result in how the Chief Justice ruled in this case and provide a greater understanding of the law.

The macro legal analysis will be performed through the lens provided by legal scholar Jeffrey Rosen. Jeffrey Rosen is a contemporary legal scholar who is the legal affairs editor of "The New Republic" and a professor of law at George Washington University.[27] His text "The Most Democratic Branch" presents a theory of what makes the Supreme Court effective and how the Supreme Court can maintain its independence.

Rosen's theory defies the conventional wisdom that the Supreme Court is a "counter-majoritarian force defying popular will or protecting minorities from the tyranny of the mob."[28] Rosen claims the Supreme Court has traditionally deferred to the national consensus of opinion on important issues of constitutional law. Rather than thwarting democratic views, the Supreme Court has mirrored democratic views. His claim is that the Supreme Court has and should continue to defer to majority will. This macro legal analysis will determine if the decision offered by the Supreme Court in the Solomon Amendment case supports or refutes Rosen's claims.

Definition of Terms[29]

Amicus Curiae: Latin for friend of the court. A qualified person who is not a party to the action but gives information to the court on a question of law. The function of amicus curiae is to call attention to some information that might escape the court's attention.

Amicus Curiae Brief: is one submitted by someone not a party to the lawsuit, to give the court information needed to make a proper decision, or to urge a particular result on

[27] The New Republic – A Journal of Politics and the Arts, http://www.tnr.com/showBio.mhtml?pid=60 (accessed January 23, 2006)

[28] Thomas Healy "A Review of Jeffrey Rosen's The Most Democratic Branch: How the Courts Serve America", http://writ.news.findlaw.com/books/reviews/20060804_healy.html (accessed January 23, 2006)

[29] All definitions were obtained from Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, Minnesota: West Group, 2004)

behalf of the public interest or of a private interest of third parties who will be indirectly affected by the resolution of the dispute.

Appeal: a request to a higher court to review and reverse the decision of a lower court. On appeal, no new evidence is introduced; the higher court is limited to considering whether the lower court erred on a question of law or gave a decision plainly contrary to the evidence presented during trial.

Argument: a course of reasoning intended to establish a position and to induce belief.

Bill of Rights: the first ten amendments to the United States Constitution; that part of any constitution that sets forth the fundamental rights of citizenship. It is a declaration of rights that are substantially immune from government interference.

Brief: a written argument concentrating upon legal points and authorities used by the lawyer to convey to the court the essential facts of his or her client's case, a statement of the questions of law involved, the law that should be applied and the application that he or she desires made of that law by the court.

Bylaws: rules adopted for the regulation of an association's or corporations own actions.

Case: an action, cause, suit, or controversy, at law or in equity.

Certiorari: To be informed of. A means of gaining appellate review; a common law writ, issued by a superior court to a lower court, commanding the latter to certify and return to the former a particular case record so that the higher court may inspect the proceedings for irregularities or errors.

Chief Justice: the presiding member of certain courts with more than one judge; especially, the presiding member of the U.S. Supreme Court, who is the principal administrative officer of the federal judiciary.

Circuit: judicial divisions of a state or the United States. There are now thirteen federal judicial courts wherein the Unites States Courts of Appeal are allocated the appellate jurisdiction of the United States.

Circuit Court: one of several courts in a given jurisdiction; a part of a system of federal courts extending over one or more counties or districts; formerly applied to the U.S. courts of appeals.

Code: a systematic compilation of laws.

Compel: to cause or bring about by force, threats, or overwhelming pressure.

Congress: in the United States, the national legislative body consisting of the Senate and the House of Representatives. The lawmaking power of the United States vests in this body.

Constitution: the fundamental principles of law by which a government is created and a country is administered.

Constitutional Rights: individual liberties granted by the State or Federal Constitutions and protected from government interference.

Court: the branch of government responsible for the resolution of disputes arising under the laws of government.

District Court: a court, established by the U.S. Constitution, having territorial jurisdiction over a district that may include a whole state or part of it.

Docket: a formal record of the proceedings in the court whose decision is being appealed.

Enjoin: to command or instruct with authority; to suspend or restrain.

Enumerated Powers: express powers specifically granted by the Constitution such as the taxing power and the spending power granted to Congress.

Expressive Association: the constitutional right of an individual to associate with others, without undue government interference, for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly and the exercise of religion.

Federal Courts: the United States courts including district courts, court of appeals and the Supreme Court.

First Amendment: the first of ten amendments added to the Federal Constitution in 1791 by the Bill of Rights, it guarantees freedoms of speech, assembly, press, petition, and the free exercise of religion.

Freedom of Speech: the right to express one's thoughts and opinions without governmental restriction, as guaranteed by the First Amendment.

Injunction: a judicial remedy awarded to restrain a particular activity. The injunction is a preventive measure to guard against future injuries, rather than one that affords a remedy for past injuries.

Judicial Review: A court's power to review the actions of the other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional.

Jurisprudence: the science of law; the study of the structure of legal systems, such as equity, and of the principles underlying that system.

Legislation: the act of giving or enacting laws; the power to make laws.

Legislative History: those recorded events leading up to the passage of a bill including committee reports, hearings, and debates.

Opinion: the reason given for a court's judgment, finding or conclusion, as opposed to the decision, which is the judgment itself.

Oral Argument: legal arguments given in court proceedings by attorneys in order to persuade the court to decide a legal issue in favor of their client.

Petition: it is a written application addressed to a court or judge, stating facts and circumstances relied upon as a cause for judicial action, and containing a formal request for relief.

Petitioner: one who presents a petition to a court or other body either to institute an equity proceeding or to take and appeal from a judgment.

Plenary: full; complete; entire.

Precedent: previously decided case recognized as authority for the disposition of future cases.

Respondent: the party against whom an appeal is prosecuted.

Spending Power: the power granted to a governmental body to spend public funds; esp., the congressional power to spend money for the payment of debt and provision of the common defense and general welfare of the United States.

Stare Decisis: to stand by that which was decided. Rule by which common law courts are reluctant to interfere with principles announced in former decisions and therefore rely upon judicial precedent as a compelling guide to decision of cases raising issues similar to those in previous cases.

Statute: an act of the legislature, adopted under its constitutional authority, by prescribed means and in certain form, so that it becomes the law governing conduct within its scope.

Strict Scrutiny: a test to determine the constitutional validity of a statute that creates a category of persons, including classifications based upon nationality or race. Under this test, if a grouping scheme affects fundamental rights – such as the right to vote – it requires a showing that the classification is necessary to, and the least intrusive means of achieving, a compelling state interest.

Supreme Court: the highest appellate court in most jurisdictions and in the federal court system. In the federal court system, the United States Supreme Court is expressly provided for in the Constitution. It consists of a Chief Justice and eight Associate Justices appointed by the President with the advice and consent of the U.S. Senate.

Symbolic Speech: conduct or activity expressing an idea or emotion without the use of words.

Unconstitutional: conflicting with some provision of the Constitution. A statute found to be unconstitutional is considered void or as if it had never been, and consequently all rights, contracts or duties that depend on it are void.

Unconstitutional Conditions Doctrine: the rule that the government cannot condition a person's receipt of a governmental benefit on the waiver of a constitutionally protected right.

United States Code: the official codification of the federal statutes in a multivolume bound set that is issued every six years and supplemented during the intervening years.

Void for Vagueness: a doctrine that renders a criminal statute unconstitutional and unenforceable when it is so vague that persons of common intelligence must guess at its meaning and differ about its application. A statute is void when it is vague about either

what persons are within the scope of the statute, what conduct is forbidden or what punishment may be imposed.

Writ: a legal order issued by the authority and in the name of the state to compel a person to do something therein mentioned.

Significance

In depth understanding of the *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR) decision and enriching this understanding utilizing the lenses of two legal scholars will serve the individual, student, faculty, legal students, and administrators by providing a window to view the workings of the Court and its Chief Justice.

Judge Benjamin Cardozo is considered one of the greatest American jurists and his landmark text "The Nature of the Judicial Process" advocates a method for addressing the judicial decision-making process. This text was published in 1921 and still exerts influence among legal scholars and remains valuable to judges and students of law.

Jeffrey Rosen is a contemporary legal scholar and his text "The Most Democratic Branch" presents a thesis regarding the role of the Supreme Court in our governance system and how the Supreme Court can maintain its independence. Rosen's theory claims that the Supreme Court has traditionally deferred to the national consensus of opinion on important issues of constitutional law. Rather than thwarting democratic views, the Supreme Court has mirrored democratic views.

Examination of the Solomon Amendment and the decision upholding its constitutionality will assist administrators in understanding the implications and responsibilities associated with this legislation. This dissertation will provide higher

education administrators with a detailed analysis of the Solomon Amendment and the Supreme Court decision upholding its constitutionality. This dissertation will be an indispensable resource for administrators in understanding the parameters and implications associated with the Solomon Amendment. This understanding and knowledge will help administrators avoid criticism, complaints and possible future litigation.

The research of law provides a basis for understanding the changing dynamics of an evolving society and culture that is essential knowledge for higher education administrators and institutions. This dissertation will contribute to the literature on legal analysis, content analysis, judicial decision-making, the role of the Supreme Court, and management of higher education institutions.

Limitations of the Study

The information presented is based on the researcher's study of the Solomon Amendment and the litigation challenging its constitutionality. A doctoral student of education rather than that of a law student, law professional, or legal expert, accomplished this study. The information presented should not be construed as legal advice. Although this researcher scoured the Internet using such tools as *Findlaw*, *Westlaw*, *LexisNexis*, *Thomas* (Library of Congress) and utilized the print and electronic resources of the University Libraries and Law Library at the University of Nevada Las Vegas for information on the Solomon Amendment, there is likely some information that was missed.

This study utilized legal research methods and content analysis that was limited by the availability of material and the biases of the researcher. The researcher utilized

standard legal research techniques to reduce potential personal bias interfering with the analysis. Not all information retrieved was included in this study; the researcher filtered this information through his knowledge, and experiences and selected the information provided in this study.

This study only utilized one case to test the theories presented by Judge Benjamin Cardozo and Jeffrey Rosen. Utilizing more cases may support or refute the conclusions offered in this study.

Differentiating the judicial decision-making method of Chief Justice Roberts from the other Supreme Court Justices is difficult due to the unanimous decision in this case. The other Supreme Court Justices probably offered suggestions and language that may or may not have been included in the decision penned solely by Chief Justice Roberts.

Chapter I Summary

This research was organized into five chapters. Chapter I presented an introduction of the Solomon Amendment and a brief chronological history of the legislation. Included was the statement of the problem, research questions, research methodology, definition of terms, significance of the study, limitations of the study, and the chapter summary.

Chapter II presents the review of the literature, which includes the legislative and litigation history of the Solomon Amendment in *Donald H. Rumsfeld, Secretary of Defense, et al., Petitioners v. Forum for Academic and Institutional Rights, Inc.*, et al. and the chapter summary.

Chapter III presents the methodology used in the study, the framework for understanding the template of judicial decision-making presented by Judge Benjamin

Cardozo, and the theory of Jeffrey Rosen. Included is the structure of the federal court system in the United States, and the chapter summary.

Chapter IV presents the answers to the research questions and the chapter summary.

Chapter V presents a summary of the study, recommendations for further research, conclusions drawn by the researcher and the chapter summary.

CHAPTER II

LITERATURE REVIEW

Solomon Amendment Legislative History

On May 23, 1994 in the House of Representatives, during the second session of the 103d Congress, Representative Gerald Solomon (R-NY), offered a floor amendment to the National Defense Authorization Act for Fiscal Year 1995.[30]

The text of the amendment was as follows:

> SEC. . MILITARY RECRUITING ON CAMPUS.
>
> (a) Denial of Funds.--(1) No funds available to the Department of Defense may be provided by grant or contract to any educational institution that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes--
> (A) entry to campuses or access to students on campuses; or
> (B) access to directory information pertaining to students.
>
> (2) Students referred to in paragraph (1) are individuals who are 17 years of age or older.
>
> (b) Procedures for Determination.--The Secretary of Defense, in consultation with the Secretary of Education, shall prescribe regulations that contain procedures for determining if and when an educational institution has denied or prevented access to students or information described in subsection (a).
> (c) Definition.--For purposes of this section, the term ``directory information'' means, with respect to a student, the student's name, address, telephone listing, date and place of birth, level of education, degrees received, and the most recent previous educational institution enrolled in by the student.[31]

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[30] *National Defense Authorization Act for Fiscal Year 1995*, 103rd Cong., 2d sess., 1994, 140 Cong. Rec., H3861, H.R. 4301

[31] Ibid

The CHAIRMAN pro tempore, Mr. Oberstar recognized Representative Solomon as the floor leader of the debate for the proponents of the amendment. Representative Ronald V. Dellums (D-CA), California 9th District was recognized as the floor leader for opponents of the amendment. During his time Representative Solomon explained that military recruiters were being denied access to educational facilities and recruiters were being prevented from "explaining the benefits of an honorable career" in military service.[32] Solomon stated it was "outrageous" that military recruiters were being denied access to educational institutions and stated his amendment "would simply prevent any funds authorized in this act from going to any institution which prevents military recruiting on their campus."[33]

Representative Solomon stated that in his home state of New York "the entire State University system" had banned military recruiters from their campuses.[34] He reasoned it was "hypocritical" for institutions receiving grants and funding from one Federal agency to deny another federal agency access to their campuses.[35] Representative Solomon stated "Recruiting is where readiness begins" and "recruiting is the key to an all-volunteer military."[36] Solomon indicated over "95%" of military personnel serving in the armed forces at the time were high school or college graduates. He attributed these numbers to recruiting on school campuses.[37] Solomon argued the Armed Forces were "on

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[32] Ibid

[33] Ibid

[34] Ibid

[35] Ibid

[36] Ibid

[37] Ibid

the wane" and to reverse this slide on behalf of military preparedness; recipients of federal money at college and universities that did not allow military recruiters had to be told that "if you do not like the Armed Forced, if you do not like its policies, that is fine. That is your First-amendment rights. But do not expect Federal dollars to support your interference with our military recruiters."[38]

In his opposition Representative Dellums pointed out that the amendment offered addressed a law that was enacted in 1972.[39] Representative Dellums pointed out that the Solomon Amendment differed because it "extended beyond the universities to include high schools..." and it "eliminated the flexibility on the part of the Secretary of Defense to waive the prohibition when the Secretary of Defense perceives this to be in the national interest of the country."[40] Representative Dellums expressed concerned that the amendment proposed would "...chill or abridge privacy, speech or conscience..."[41] He contended that federal funds would not be at risk if there was refusal from higher education institutions to cooperate with any other government agency and the decision on who to allow on campus as it related to employment recruitment decisions should be with the institution of higher education not the government. Representative Dellums referred to the democratic process and political system of the United States being promoted

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[38] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3861.

[39] *National Defense Authorization Act for 1973, Pub. L. No. 92-436, 86 Stat. 734 (1972).* The Act Stated: No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such institution for the premises of the institution.... *Id& 606(a), 86 Stat. at 740*)

[40] Ibid

[41] Ibid

worldwide but being used in the United States to "browbeat" higher education institutions because they take a stance contradictory to the Federal Government.[42]

Representative Underwood (D-GU) Guam, also stated his opposition to the amendment pointing out that current statutes (10 USC 2358) prohibit the use of Federal funds at higher education institutions that bar military recruiters from campus and the amendment proposed by Representative Solomon would be "overkill."[43] He also identified the Department of Defense opposition to the Solomon Amendment as "...unnecessary, duplicative and potentially harmful to defense research initiatives."[44] Representative Pombo (R-CA), California offered his strong support of the Solomon Amendment. He argued that higher education institutions needed to be "put on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed either by this House or by the American people."[45] He stated if institutions of higher education are "too good –or too righteous ...to afford our military the same recruiting opportunities offered to private corporations – then they may also be too good to receive.....taxpayer dollars..." He also declared an intention to "send a message over the wall of the ivory tower of higher education" and that "starry-eyed idealism comes with a price."[46] Representative Rohrabacher (R-CA), California also supported the amendment. She pointed out that those students looking to serve in the armed services

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[42] Ibid

[43] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3863.

[44] Ibid

[45] Ibid

[46] Ibid

would have their rights violated if institutions of higher education restricted access of military recruiters to campus.

Time was provided to Representative Harman (D-CA), California who as a member of the Committee on Armed Services spoke in opposition to the amendment. Representative Harman supported the expressed goals of the amendment of recruiting the "best and brightest."[47] Her disagreement with the amendment was that in achieving the goal of recruitment, it "trampled on the fundamental principles on which our society is based, like nondiscrimination and academic freedom."[48] She argued the amendment as offered by Representative Solomon "takes a meat ax approach" to military recruitment on college campuses and is "punitive and unnecessary."[49]

With his remaining time Representative Solomon reiterated his contention that recruitment for the armed services is key to an all voluntary military and recruiters should be allowed to explain an "honorable military career" to students at institutions of higher education.[50] At the end of the time for debate the Chairman called for a voice vote and announced the "noes appeared to have it."[51] Representative Solomon demanded a recorded vote on the amendment and a recorded vote was ordered. The recorded vote resulted in 271 ayes and 126 noes with 41 not voting.[52] Thus the amendment was agreed to by the House and became known as the "Solomon Amendment." The Solomon

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[47] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3864.

[48] Ibid

[49] Ibid

[50] Ibid

[51] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3865.

[52] Ibid

Amendment was included as part of the National Defense Authorization Act of 1995, H.R. 4301 and was passed by the House on June 15, 1994.[53]

When the house passed version of the National Defense Authorization Act for Fiscal Year 1995 reached the Senate the title of S. 2182 was substituted in lieu of H.R. 4301.[54] The Senate voted on S. 2182 on September 13, 1994 with 80 yea votes, 18 nays and two not voting.[55] The act was then presented to the President of the United States on September 28, 1994.[56] The act was signed by President Bill Clinton on October 5, 1994 and became Public Law No: 103-337.[57]

Two months after the Solomon Amendment became law, on January 4, 1995, Representative Solomon (R-NY) introduced the "Military Recruiter Campus Access Act" as part of his "Extensions of Remarks."[58] This act would deny all Federal funds not just DoD funds to institutions of higher education that barred or impaired military recruiting. Solomon stated he was "outraged" that taxpayer dollars were going to institutions that interfered with the "Federal Government's constitutionally mandated function of raising a

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[53] Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994)

[54] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, S8321.

[55] U.S. Senate Roll Call Votes 103rd Congress - 2nd Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00297 (accessed August 14, 2007)

[56] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, S13579.

[57] S. 2182- An Act to authorize appropriations for fiscal year 1995 for military activities of the Department of Defense, for military construction, and for defense programs of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes, http://thomas.loc.gov/cgi-bin/bdquery/z?d103:SN02182:@@@S|TOM:/bss/d103query.html (accessed August 14, 2007)

[58] Cong. Rec., 104th Cong., 2d sess., 1994, January 4, 1995 (Extensions), E13, http://www.thomas.gov/cgi-bin/query/D?r104:1:./temp/~r104HlRhEg:: (accessed August 14, 2007)

military."[59] Solomon argued the National Defense Authorization Act for Fiscal Year 1995 had begun to deal with the "injustice" of barring military recruiters from higher education campuses but the law only denied DoD funds.[60] Solomon estimated that the DoD funds eligible to higher education institutions only amounted to approximately $3 billion annually and there was "additional leverage" that could be used by withholding the additional $8 billion annually the Federal Government provided to colleges and universities through grant and contract funding through other departments such as Health and Human Services, Agriculture and the National Science Foundation.[61] Solomon contended barring military recruiters from college and university campuses was "an intrusion on Federal prerogatives, a slap in the face to ...military personnel, and an impediment to sound national security policy."[62]

This measure became H.R. 142 and was referred to the Committee on National Security and the Committee on Economic and Educational Opportunities on January 4, 1995.[63] H.R. 142 was referred to the Subcommittee on Military Personnel and an Executive Comment was requested from the Department of Defense.[64] On January 25, 1995 it was referred to the Subcommittee on Postsecondary Education, Training and

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[59] Ibid

[60] Ibid

[61] Ibid

[62] Ibid

[63] H.R.142, http://www.thomas.gov/cgi-bin/bdquery/D?d104:1:./temp/~bdFcxw:@@@L&summ2=m&|/bss/104search.html| (accessed February 26, 2008)

[64] Ibid

Life-Long Learning.[65] An "Unfavorable Executive Comment" was received from the Department of Defense on June 27, 1995.[66] This measure never left committee and no further actions occurred.

On June 11, 1996 Representative Solomon (R-NY) with Representative Pombo (R-CA), offered an amendment to the Omnibus Consolidated Appropriations Act (OCAA) of 1997.[67]

The text of the amendment was as follows:

> Sec. 516. (a) Denial of Funds for Preventing Federal Military Recruiting on Campus: None of the funds made available in this Act may be provided by contract or grant (including a grant of funds to be available for student aid) to any institution of higher education when it is made known to the Federal official having authority to obligate or expend such funds that the institution (or any subelement thereof) has a policy or practice (regardless of when implemented) that prohibits, or in effect prevents--
>
> (1) entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of Federal military recruiting; or
>
> (2) access to the following information pertaining to students (who are 17 years of age or older) for purposes of Federal military recruiting: student names, addresses, telephone listings, dates and places of birth, levels of education, degrees received, prior military experience; and the most recent previous educational institutions enrolled in by the students
>
> (b) Exception: The limitation established in subsection (a) shall not apply to an institution of higher education when it is made known to the Federal official having authority to obligate or expend such funds that--
>
> (1) the institution (or subelement) has ceased the policy or practice described in such subsection; or

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[65] Ibid

[66] Ibid

[67] *Departments of Labor, Health and Human Services, and Education, and related agencies Appropriations Act, 1997,* 104th Cong., 2d sess., Congressional Record 104, (House of Representatives - June 11, 1996) : H7334.

(2) the institution has a longstanding policy of pacifism based on historical religious affiliation.[68]

During his time Solomon restated the problem of military recruiters being denied access to college and university campuses and being prevented from explaining the benefits of a career in the Armed Forces. He further stated his amendment would "simply prevent any funds appropriated in this act from going to institutions of higher learning which prevent military recruiting on their campus..."[69] He also argued institutions of higher education receiving taxpayer funds should not be allowed to "turn their back on the young people who defend this country" and the amendment was "simple common sense and fairness to the people who defend our country."[70]

The amendment was agreed to, by voice vote, and provided for the withholding of federal funds associated with the Department of Defense, Transportation, Labor, Health and Human Services and Education to institutions of higher education that prohibited or prevented military recruiters' access to directory information or entry to campus to access students.[71] The House passed H.R. 3610 on June 13, 1996 with a vote of 278 yeas and 126 nays with 30 not voting.[72] H.R. 3610 was forwarded to the Senate on June 14, 1996.[73] The Bill was passed by the Senate on July 18, 1996 by a vote of 72 yeas and 27 nays with

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[68] Ibid

[69] *Departments of Labor, Health and Human Services, and Education, and related agencies Appropriations Act, 1997,* 104th Cong., 2d sess., Congressional Record 104, (House of Representatives - June 11, 1996) : H7335.

[70] Ibid

[71] Ibid

[72] Final Vote Results for Roll Call 247, http://clerk.house.gov/cgi-bin/vote.asp?year=1996&rollnumber=247 (accessed August 17, 2007)

[73] 104 Cong. Rec., 104 Cong. 2d sess., Message from the House (Senate - June 14, 1996) : S6303.

one not voting.[74] After passing the Senate, the Bill was presented to and signed by President Bill Clinton on September 30, 1996 and became Public Law No: 104-208.[75] Public Law No: 104-208 expanded the financial penalty for prohibiting or preventing military recruiters' access to college and university campuses. The expanded penalties also included funds associated with federal student financial assistance.

March 16, 1999, Representative Barney Frank, (D-MA) Massachusetts and Tom Campbell, (R-CA) California introduced H.R. 1123 that would "exclude grants for student financial assistance from the prohibition on certain departments and agencies of the Government making grants to institutions of higher education that prevent ROTC access to campus or military recruiting on campus ..."[76] This bill was included in H.R. 2561 the Department of Defense Appropriations Act for F.Y. 2000.[77] H.R. 2561 was introduced on July 20, 1999 and was passed by the House on July 22, 1999 with a vote of 379 yeas and 45 nays.[78] The Senate received the measure on July 27, 1999 and it passed with an amendment by 'Unanimous Consent' on July 28, 1999. President Bill Clinton signed H.R. 2561 on October 25, 1999 and it became Public Law No: 106-79.[79]

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[74] U.S. Senate Roll Call Votes 104th Congress - 2nd Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00200 (accessed August 17, 2007)

[75] H.R. 3610, http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03610:@@@R (accessed August 17, 2007)

[76] 106 Cong. Rec., 106th Cong., 1st sess., Public Bills and Resolutions -- (House of Representatives - March 16, 1999) : H1334.

[77] H.R. 2561 - Making appropriations for the Department of Defense for the fiscal year ending September 30, 2000, and for other purposes, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02561:@@@S|TOM:/bss/d106query.html (accessed August 17, 2007)

[78] Final Vote Results for Roll Call 334, http://clerk.house.gov/evs/1999/roll334.xml (accessed August 17, 2007)

[79] H.R. 2561 - Making appropriations for the Department of Defense for the fiscal year ending September 30, 2000, and for other purposes, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR02561:@@@S|TOM:/bss/d106query.html (accessed August 17, 2007)

Pub. L. 106-79, title VIII, Sec. 8120, Oct. 25, 1999, 113 Stat. 1260, provided that:

> "During the current fiscal year and hereafter, any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs may be used for the purpose for which the grant is made without regard to any provision to the contrary in section 514 of the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, 1997 ([former] 10 U.S.C. 503 note), or section 983 of title 10, United States Code."[80]

After this amendment student financial assistance funds were no longer part of the prohibition of federal funds associated with the Solomon Amendment. The Solomon Amendment now provided for the withholding of federal funds associated with the Department of Defense, Transportation, Labor, Health and Human Services and Education to institutions of higher education that prohibited or prevented access to directory information or entry to campus to access students.

Prior to January 2000 the Solomon Amendment restrictions were interpreted to only pertain to a particular school within the parent higher education institution. In 2000, the Solomon Amendment was clarified to deny funds to all parts of the higher education institution.

The Senate Committee on Armed Services for the 106th Congress, 1st Session, chaired by Senator John Warner, Virginia, clarified the Solomon Amendment by identifying the congressional intent of the amendment. The Congressional intent, according to the Committee, "is that if a college or university denies military recruiters

[80] Solomon Amendment, http://www.yalerotc.org/Solomon.html (accessed August 17, 2007)

access, then the entire institution shall be denied any further Department of Defense Funds."[81] The report directed the Secretary of Defense to examine the policies related to the Solomon Amendment and to insure the "policies and practices are consistent with the intent of the Congress."[82]

After the Committee clarification, if a law school decided to restrict military recruiter access then the parent institution would suffer the financial loss of federal funds. It was estimated that Yale University could lose $300 million annually in federal funding should it bar military recruiters from its campus.[83]

The Solomon Amendment was amended again in 2004 as part of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.[84] H.R. 4200 was introduced on April 22, 2004 for the purposes of authorizing "appropriations for fiscal year 2005 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes."[85] The Bill with several amendments was passed by the House on May 20, 2004 by a recorded vote of 391 ayes

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[81] *National Defense Authorization Act for Fiscal Year 2000 Report [to accompany S. 1059]on Authorizing Appropriations for Fiscal Year 2000 for Military Activities of the Department of Defense, for Military Construction, and for Defense Activities of the Department of Energy, to prescribe Personnel Strengths for such Fiscal Year for the Armed Forces, and for Other Purposes together with additional views,* 106th Congress, 1st Sess., - S. Rep. 106-50 - Committee Report 140 of 294.

[82] Ibid

[83] Alice Gomstyn, *Military Recruiting Goes to Court: Law Professors and students file multiple lawsuits seeking to uphold antidiscrimination policies,* http://chronicle.com/prm/weekly/v50/i16/16a01701.htm (accessed January 23, 2006)

[84] 10 USC § 983(b)

[85] *Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,* Public Law 108-375, U.S. *Statutes at Large* 118. 1811 (2004)

and 34 noes.[86] The Bill was received in the Senate on May 21, 2004 and passed the Senate by 'Unanimous Consent' on June 23, 2004. H.R. 4200 was presented to President George W. Bush on October 21, 2004, was signed on October 28, 2004 and became Public Law 108-375.[87]

Public Law 108-375 required institutions of higher education to provide:

> "(a) Equal Treatment of Military Recruiters With Other Recruiters.--
> Subsection (b)(1) of section 983 of title 10, United States Code, is amended--
> (1) by striking ``entry to campuses'' and inserting ``access to campuses''; and
> (2) by inserting before the semicolon at the end the following: ``in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.''[88]

The current Solomon Law codified in 10 United States Code 983, states:

> § 983. Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies.
>
> (a) Denial of Funds for Preventing ROTC Access to Campus– No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents–
>
> (1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in

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[86] Final Vote Results for Roll Call 206, http://clerk.house.gov/evs/2004/roll206.xml (accessed August 27, 2007)

[87] H.R. 4200 - To authorize appropriations for fiscal year 2005 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04200:@@@S|TOM:/bss/d108query.html (accessed August 27, 2007)

[88] *Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, Public Law 108-375, U.S. *Statutes at Large* 118. 1811 (2004), § 552.

accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) Denial of Funds for Preventing Military Recruiting on Campus– No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents–

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(C) Exceptions– The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that–

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) Covered Funds–

(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:
(A) Any funds made available for the Department of Defense.

(B) Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(C) Any funds made available for the Department of Homeland Security.

(D) Any funds made available for the National Nuclear Security Administration of the Department of Energy.

(E) Any funds made available for the Department of Transportation.

(F) Any funds made available for the Central Intelligence Agency.

(2) Any Federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

(e) Notice of Determinations– Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary–

(1) shall transmit a notice of the determination to the Secretary of Education, to the head of each other department and agency the funds of which are subject to the determination, and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) Semiannual Notice in Federal Register– The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).[89]

The Solomon Amendment began as a floor amendment in 1994 and was subsequently amended until 2004. Over this ten-year period the Solomon Amendment was amended to expand the financial penalties associated with noncompliance with the

[89] SolomonResponse.Org – The Current Solomon Law, http://www.law.georgetown.edu/solomon/solomon.html#current (accessed August 27, 2007)

statute. The expansion of the financial penalties associated with noncompliance identifies Congress's support of military recruitment on college and university campuses.

The Association of American Law Schools (AALS)

The Association of American Law Schools, Inc. (AALS) was founded in 1900 at Saratoga Springs, New York, with Professor James Bradley Thayer of Harvard Law School as its first President.[90] The creation of the AALS served as a division within the legal profession between the "academic lawyer" and the "practitioner."[91] AALS membership is open to schools and not individuals and serves as "a learned society of law teachers and is legal education's principal representative to the federal government and to other higher education organizations and learned societies."[92]

The stated purpose of the AALS is "the improvement of the legal profession through legal education."[93] The Association "holds an Annual Meeting, sponsors professional development programs, produces a Directory of Law Teachers, sponsors teacher placement services, and compiles statistics."[94] The Association also visits member law schools to "review whether schools are complying with AALS Bylaws and Executive Committee Regulations."[95]

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[90] The Association of American Law Schools, http://web.library.uiuc.edu/ahx/aals/default.asp (accessed September 1, 2007)

[91] Stevens, Robert Bocking, (1983). *Law School: Legal Education in America from the 1850's to the 1980's* (1st ed., pp. 38). Chapel Hill and London: University of North Carolina Press

[92] Appeal from the United States District Court for the District of New Jersey, Brief of Amicus Curiae Association of American Law Schools in Support of Appellants, http://www.law.georgetown.edu/solomon/documents/JennerAALSbrf.pdf (accessed September 1, 2007)

[93] The Association of American Law Schools, http://web.library.uiuc.edu/ahx/aals/default.asp (accessed September 1, 2007)

[94] Ibid

[95] Ibid

The AALS does not accredit law schools. It is a separate entity from the American Bar Association (ABA), which has the responsibility of accrediting law schools. However, of the 188 law schools in America accredited by the ABA, 166 are members of the AALS.[96] Therefore, it is fair to assume that complying with the AALS Bylaws is perceived as impacting accreditation.

AALS member schools are required to "pursue policies that ensure their students equal opportunity and nondiscrimination on the basis of sexual orientation."[97] The AALS voted in 1990 to include sexual orientation as a protected category in law school non-discrimination policies.[98] In addition it is AALS policy that "a member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation."[99] The AALS and its member law schools believe that "discrimination is antithetical to their mission." Therefore, the AALS and its member schools "have expressed and enforced principles of nondiscrimination in all aspects of the law school experience."[100]

AALS Bylaw 6-3(b) states that

> "A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age,

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[96] The Association of American Law Schools, "Member and Fee Paid Schools" http://www.aals.org/about_memberschools.php (accessed September 24, 2007); provides a list of member schools in the AALS

[97] Appeal from the United States District Court for the District of New Jersey, Brief of Amicus Curiae Association of American Law Schools in Support of Appellants, http://www.law.georgetown.edu/solomon/documents/JennerAALSbrf.pdf (accessed September 1, 2007)

[98] Brief of Amicus Curiae Association of American Law Schools in Support of Appellants, 5, http://www.law.georgetown.edu/solomon/documents/JennerAALSbrf.pdf (accessed September 1, 2007)

[99] Ibid

[100] Ibid

> disability, or sexual orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity".[101]

The implementation of Bylaw 6-3(b) is as follows:

> "A member school shall inform employers of its obligation under Bylaw 6-3(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-3(b).[102]

The outcome of following the AALS Bylaws and the nondiscrimination policies of some law schools resulted in AALS member schools prohibiting or restricting military recruitment on law school campuses.

In 1994, a study requested by Congress "found 140 institutions of higher education" had denied military recruiters access to their campuses.[103] This refusal by law schools may have been one of the reasons Representative Gerald Solomon initiated the Solomon Amendment. The Solomon Amendment proposed in 1994 only restricted funds from the Department of Defense, which was "largely irrelevant to law schools."[104] Therefore, the AALS continued to require its member schools to "not schedule on-campus interviews, assist in scheduling interviews, include military job opportunities in

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[101] Ibid., Brief for The Association of American Law Schools as *Amicus Curiae* In Support of Respondents ¶2.

[102] Ibid

[103] 140 Cong. Rec. S8172 (daily ed. July 1, 1994) (Sen. Nickles); Nickles Amendment No. 2148.

[104] Ibid., Brief for The Association of American Law Schools as *Amicus Curiae* In Support of Respondents ¶4.

lists of employers who solicit resumes, or forward law students' resumes to such employers."[105]

In 1997 Congress amended the Solomon Amendment authorizing the withholding of federal funds associated with other federal agencies in addition to the Department of Defense. Schools that prohibited or prevented access to directory information or entry to campus to access students would lose funds from the Department of Defense, Transportation, Labor, Health and Human Services and Education.[106] The funds associated with the Department of Education included the Perkins Loan Funds and Work-Study funds which affected law schools and law students.[107]

In the same year the AALS issued a Memorandum to the Deans of member and fee-paid law schools that provided a new AALS "amelioration" policy to its member schools.[108] The memorandum addressed the potential financial consequences of the newly amended Solomon Amendment and provided member schools with an option for non-compliance with AALS Bylaws related to denial of access to military recruiters.

The AALS memorandum stated "nearly 90 percent of American law schools stand to lose either Work-Study or Perkins Loan funds or both."[109] The AALS Executive Committee recognized the current version of the Solomon Amendment placed "most law schools in the difficult position of either foregoing financial aid funds that are critical to

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[105] The Association of American Law Schools, "MEMORANDUM 97-46," Excerpts from dated August 13, 1997 http://www.aals.org/deansmemos/97-46.html (accessed September 26, 2007)

[106] SolomonResponse.Org- Solomon Amendment, http://www.law.georgetown.edu/solomon/solomon.html (accessed January 23, 2006)

[107] The Association of American Law Schools, "MEMORANDUM 97-46," Excerpts from dated August 13, 1997 http://www.aals.org/deansmemos/97-46.html (accessed September 26, 2007)

[108] Ibid

[109] Ibid

their students or receiving the financial aid funds but failing to provide an environment that adequately protects its students from the experience of discrimination."[110] Therefore, the Executive Committee decided each school "must be permitted to decide for itself how to resolve this conflict without being held in impermissible violation of the bylaws"[111]

The Executive Committee decided to excuse member schools that chose not to comply with the AALS's nondiscrimination policy as long as they "engage in appropriate activities to ameliorate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students."[112] The AALS memorandum also urged member schools to "examine the actual extent of financial aid and other funds that it is at risk of losing, to explore ways of avoiding the loss of funds through turning to alternative sources, and to consider the range of ways that it might adopt to ameliorate the negative effects of granting access, if access were to be granted."[113]

Amelioration efforts suggested by the AALS included each member schools students and others in the law community be informed each year that the "military discriminates on a basis not permitted by the school's nondiscrimination rules and the AALS bylaws and that the military is being permitted to interview only because of the loss of funds that would otherwise be imposed under the Solomon Amendment."[114] Other suggestions included "forums or panels for the discussion of the military policy or for the

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[110] Ibid

[111] Ibid

[112] Ibid

[113] Ibid

[114] Ibid

discussion of discrimination based on sexual orientation."[115] The memorandum also requested member schools to provide the AALS with those ameliorative efforts that were "effective" so the AALS could share those efforts with other member schools.[116]

As the Solomon Amendment was modified, the AALS informed its member schools of its options in addressing the Solomon Amendment and meeting the AALS bylaw requirements. When the Solomon Amendment was clarified to restrict funds to parent institutions, the AALS informed its member schools of options in addressing the Solomon Amendment. When the Solomon Amendment was amended to include funds associated with student financial assistance, the AALS notified its member schools of options in addressing the amendment.

"Don't Ask, Don't Tell, Don't Pursue"[117]

The policy concerning homosexuality in the United States Armed Forces was part of the National Defense Authorization Act of 1994 and became Public Law 103-160 when it was signed by President Bill Clinton on November 30, 1993.[118] "Don't Ask, Don't Tell" (DADT) is the popular name for Pub. L. 103-160 which is codified in 10 U.S.C. § 654.[119]

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[115] Ibid

[116] Ibid

[117] Statutes and Regulations, http://dont.stanford.edu/doclist.html (accessed October 1, 2007)

[118] H.R. 2401- To authorize appropriations for fiscal year 1994 for military activities of the Department of Defense, to prescribe military personnel strengths for fiscal year 1994, and for other purposes., http://thomas.loc.gov/cgi-bin/bdquery/z?d103:HR02401:@@@S%7CTOM:/bss/d103query.html (accessed October 3, 2007)

[119] U.S. Code Collection - Policy concerning homosexuality in the armed forces, http://www.law.cornell.edu/uscode/html/uscode10/usc_sec_10_00000654----000-.html (accessed October 3, 2007)

In July 1993 President Clinton stated this new policy was " a real step forward" and "the right thing to do and the best way to do it" because it provided "greater protection to those who happen to be homosexual and want to serve their country honorably in uniform, obeying all the military's rules against sexual misconduct."[120] President Clinton wanted to allow those who wish to serve their country in the Armed Forces the opportunity to do so regardless of "their status."[121] The President identified that there were four "essential elements" of the policy.

1. Service men and women were to be judged based on their conduct, not their sexual orientation
2. The practice of not asking about sexual orientation in the enlistment procedures
3. Open statements of homosexuality would create a "rebuttable presumption" that prohibited conduct is intended however an opportunity would be provided to refute the presumption
4. The provisions of the Uniform Code of Military Justice would be enforced in an "even-handed manner" to both heterosexuals and homosexuals.[122]

The President also acknowledged that the policy was not "a perfect solution" but argued that it was an "honorable compromise."[123] President Clinton contended that the

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[120] *President's Remarks Announcing the New Policy on Gays and Lesbians in the Military,* July 19, 1993, http://dont.stanford.edu/regulations/pres7-19-93.pdf (accessed October 3, 2007)

[121] Ibid., 1370.

[122] Ibid., 1372.

[123] Ibid

measure allowed those who wanted to serve an opportunity and also helped in "resolving an issue that has divided our military and our Nation ... for too long." [124]

The policy states:

> "Policy – A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
>
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that–
>
> (A) such conduct is a departure from the member's usual and customary behavior;
>
> (B) such conduct, under all the circumstances, is unlikely to recur;
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
>
> (E) the member does not have a propensity or intent to engage in homosexual acts.
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
>
> (3) That the member has married or attempted to marry a person known to be of the same biological sex."[125]

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[124] Ibid

[125] SolomonResponse.Org – The U.S. Military's Discriminatory Policy: Don't Ask, Don't Tell, http://www.law.georgetown.edu/solomon/background.html (accessed October 4, 2007)

The constitutionality of DADT has been upheld in federal court in the 2nd, 4th and 8th Circuits.[126]

Examination of DADT in more detail was outside of the scope of this dissertation. Additional information can be found at http://dont.stanford.edu/.[127] This database is a digital law project of the Robert Crown Law Library at Stanford Law School.[128] This database "contains primary materials on the U.S. military's policy on sexual orientation, from World War I to the present, as identified by Professor Janet E. Halley's book, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Duke University Press, 1999)."[129] The database includes "legislation; regulations; internal directives of service branches; materials on particular service members' proceedings (from hearing board transcripts to litigation papers and court decisions); policy documents generated by the military, Congress, the Department of Defense and other offices of the Executive branch; and advocacy documents submitted to government entities."[130]

A second source of information is the text *Don't Ask, Don't Tell: Debating the Gay Ban in the Military.*[131] This text contains sections on homosexuals in the military

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[126] Able v. United States, 155 F.3d 628 (2nd Circuit 1998); Richenberg v. Perry, 97 F.3d 256 (8th Circuit 1996), *Certiorari denied*, 522 U.S. 807 (1997); Thomasson v. Perry, 80 F.3d 915 (4th Circuit), *Certiorari denied*, 519 U.S. 948 (1996), http://www.cir-usa.org/legal_docs/solomon_amicus.pdf (accessed October 5, 2007)

[127] Don't Ask, Don't Tell, Don't Pursue – A digital law project of the Robert Crown Law Library at Stanford Law School, http://dont.stanford.edu/ (accessed October 1, 2007)

[128] Ibid

[129] Ibid

[130] Ibid

[131] Aaron Belkin and Geoffrey Bateman, eds., *Don't Ask, Don't Tell: Debating the Gay Ban in the Military* (Boulder: Lynne Rienner, 2003)

before DADT, the cost of DADT, Foreign Military experiences that have lifted the gay ban in the military, and the future of DADT.[132]

Forum for Academic and Institutional Rights (FAIR)

The Forum for Academic and Institution Rights (FAIR) is a New Jersey nonprofit membership corporation led by founder and president Mr. Kent Greenfield, professor, Boston College Law School and represented twenty-five law schools throughout the United States.[133] The organization is also guided by a Board of Directors including Sylvia Law, Erwin Chemerinsky, William Eskridge, Chai Feldblum, George Fisher, Nicholas Georgakopoulos, and Michael Seidman.[134]

The mission of the organization is "to promote academic freedom and to support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education."[135] FAIR was created to challenge the Solomon Amendment on behalf of its members and the lawsuit was its first project. FAIR membership was kept secret to avoid retribution against any law school that participated in the lawsuit against the Solomon Amendment. The member schools of FAIR "recognize and agree that the nondiscrimination policies of each of its members is central to their mission..."[136]

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[132] Ibid

[133] SolomonResponse.Org, http://www.law.georgetown.edu/solomon/joinFAIR.html (accessed January, 24, 2006)

[134] Kent Greenfield, President FAIR letter, http://www.law.georgetown.edu/solomon/documents/greenfieldLetter.pdf (accessed September 10, 2007)

[135] United States District Court, District of New Jersey, Complaint 03-Civ.4433, http://www.law.georgetown.edu/solomon/documents/Sola_Compl.pdf (accessed January, 24, 2006)

[136] Ibid

Litigation History

District Court

On Friday, September 19, 2003 the Forum for Academic and Institutional Rights, Inc. (FAIR) with other Plaintiffs filed a civil action in the United States District Court, District of New Jersey against Defendants Donald H. Rumsfeld in his capacity as U.S. Secretary of Defense, et al.[137] FAIR sought a temporary restraining order (TRO) and preliminary injunction enjoining enforcement of the Solomon Amendment.[138] On Friday, September 26, 2003 Defendants submitted a 'Motion to Dismiss for Lack of Standing' and 'Opposition to Plaintiff's Motion for Preliminary Injunction.' The Plaintiffs 'Reply Brief' was submitted on Monday, September 29, 2003.[139]

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[137] Civil Action No: 03-4433; additional plaintiffs were the Society of American Law Teachers, Inc. ("SALT"), The Coalition for Equality ("CFE"), Rutgers Gay and Lesbian Caucus ("RGLC"), law professors Erwin Chemerinsky and Sylvia Law (collectively, "Law Professors"), and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild (collectively, "Law Students"); SALT is a New York corporation with nearly 900 law faculty members committed "to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities."; of Boston College Law School, and RGLC, of Rutgers University School of Law, (collectively, "Law Student Associations") are student organizations committed "to furthering the rights and interests of all groups including gays and lesbians." (Am. Compl. ¶ 9); Plaintiff Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School ("USC Law"), and Plaintiff Sylvia Law is the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University Law School ("NYU Law"); Plaintiffs Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild are students at Rutgers University School of Law; Defendant Donald Rumsfeld heads the Department of Defense ("DoD") in his capacity as the United States Secretary of Defense. The DoD is charged with implementing the Solomon Amendment and making the ultimate determination as to whether an institution is in compliance therewith. Defendant Rod Paige heads the Department of Education in his capacity as the United States Secretary of Education. Defendant Elaine Chao heads the Department of Labor in her capacity as the United States Secretary of Labor. Defendant Tommy Thompson heads the Department of Health and Human Services in his capacity as the United States Secretary of Health and Human Services. Defendant Norman Mineta heads the Department of Transportation in his capacity as the United States Secretary of Transportation. Defendant Tom Ridge heads the Department of Homeland Security as the United States Secretary of Homeland Security. The Departments collectively make available billions of dollars in the form of grants and federal contracts each year to institutions of higher education covered by the Solomon Amendment., http://lawlibrary.rutgers.edu/fed/html/ca03-4433-1.html (accessed September 1, 2007)

[138] Ibid

[139] Ibid

In their complaint FAIR contended the Solomon Amendment interfered with the "freedom of educational institutions...to shape their own pedagogical environments."[140] FAIR argued the government was interfering with the law schools ability to have an "open environment of equality, mutual respect and dignity."[141] This contention was based on FAIR's assumption that the Solomon Amendment required law schools to "propagate a message they abhor" that was in direct conflict with the non-discrimination policies of the law schools.[142] The message of the Solomon Amendment, they alleged, was one of "invidious discrimination" and was a "moral wrong."[143]

FAIR stated in their complaint that "for over a decade, nearly every accredited law school has maintained policies against offering their resources, support or endorsement to any employer that discriminates."[144] Further the non-discrimination policies are meant to protect individuals from discrimination based on such categories as age, national origin, religion, gender and sexual orientation. The Law Schools "admit students, award scholarships, hire and promote faculty, and hire staff" in concert with their non-discrimination policies.[145]

In addition, the law schools employment recruiting policies were consistent with their non-discrimination policies. This led to law schools refusing to "offer school

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[140] Second Amended Complaint 03 Civ. 4433 (JCL): Am. Compl. 2, http://www.law.georgetown.edu/solomon/documents/SecondAmendedComplaint.pdf (accessed September 1, 2007)

[141] Ibid., 4.

[142] Ibid., 2.

[143] Ibid., 3.

[144] Ibid

[145] Ibid., 16.

resources, support, or endorsement to any employer that discriminates based on protected categories."[146] This policy was enforced "even-handedly" to all employers. Further, this even-handed enforcement allowed the law schools to not "simply make a statement that invidious discrimination is a moral wrong,...they also commit themselves to behave in a manner consistent with their core value of judging people solely on their merits."[147]

The FAIR law schools were also following the Bylaws of the Association of American Law Schools (AALS) that required member schools to provide its "students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation."[148] FAIR's resistance to the Solomon Amendment is rooted in the discriminatory policies and practices of DADT and their main claims were based on First Amendment protected categories. FAIR requested a temporary restraining order (TRO) and preliminary injunction because the Solomon Amendment:

(1) conditions a benefit–federal funding–on the surrendering of law schools' First Amendment rights of academic freedom, free speech, and freedom of expressive association

(2) discriminates on the basis of viewpoint by promoting only a pro-military recruiting message and by punishing only those schools that exclude the military because they find the military's policy against homosexual conduct morally objectionable

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[146] Ibid., 3.

[147] Ibid

[148] The Association of American Law Schools, "Bylaws and Executive Committee Regulations Pertaining to the Requirements of Membership," Section 6.3(b), http://www.aals.org/about_handbook_requirements.php (accessed September 1, 2007)

(3) violates the void-for-vagueness doctrine for lack of clear guidelines and for conferring unbridled discretion on military bureaucrats to decide which institutions to target and what acts or omissions amount to non-compliance with the statute.[149]

FAIR asked the District Court to "vindicate the right of law schools and law professors to choose for themselves, free from government interference, how best to advance their educational missions; what messages to articulate to their communities; and how to communicate those messages."[150]

In the Government's 'Motion to Dismiss' they challenged the standing of FAIR to bring action. The Government declared "the Solomon Amendment ... does not apply to organizations, associations, law school faculties, or law school students; it applies to law schools and other institutions of higher education, none of whom are parties to this action."[151] In addition to challenging FAIR's standing to bring action, the Government challenged FAIR's injury claim. The Government asserted that the injury claim was not sufficient to afford Court Jurisdiction. In their documents the Government argued that the "plaintiffs have failed to establish that they have suffered a constitutionally meaningful injury" and that FAIR failed to "establish any likelihood of success on the merits of their claim that the Solomon Amendment infringes upon constitutionally protected First

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[149] United States District Court District of New Jersey, Civil Action NO: 03-4433 (JCL), 3, http://lawlibrary.rutgers.edu/fed/html/ca03-4433-1.html (accessed September 12, 2007)

[150] United States District Court District of New Jersey, Second Amended Complaint 03 Civ. 4433 (JCL), ¶5, http://www.law.georgetown.edu/solomon/documents/SecondAmendedComplaint.pdf (accessed September 12, 2007)

[151] Memorandum of Law in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction, 1, http://www.law.georgetown.edu/solomon/documents/SolomonMemorandum.pdf (accessed September 13, 2007)

Amendment freedoms.[152] FAIR consisted of member law schools and the Government challenged FAIR's ability to "assert the rights of absent law schools."[153] This challenge was based on the fact that FAIR did not identify its members and under the Government's reasoning the Solomon Amendment did not apply to organizations or associations.

In addressing the First Amendment claim of 'Unconstitutional Conditions', the Government indicated that the Solomon Amendment and its provisions were "conditions upon the receipt of federal assistance, and not regulatory restrictions."[154] The amendment was a valid use of the Government's Spending Clause that "conditions federal funding on conduct unrelated to speech."[155] The Solomon Amendment did not impose 'Unconstitutional Conditions' on the Plaintiffs First Amendment rights because "it is not conditioned on, or related to, speech."[156]

In addressing the issue of 'Viewpoint Discrimination' the Government argued the Solomon Amendment "does not target any viewpoint."[157] The Government contended the Solomon Amendment "merely conditions the receipt of federal funds upon the institution's non-discrimination against military recruiters on campuses."[158]

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[152] Ibid., 2.

[153] Ibid., 19.

[154] Ibid., 22.

[155] United States District Court District of New Jersey, Civil Action NO: 03-4433 (JCL), http://lawlibrary.rutgers.edu/fed/html/ca03-4433-1.html (accessed September 12, 2007)

[156] Ibid., 22.

[157] Ibid., 29.

[158] Ibid

The 'Void for Vagueness' claim was also addressed in a similar manner. The Government purported that the Solomon Amendment conditions were not vague but were "clear and unambiguous."[159] An institution that "prohibits or effectively prevents the military from recruiting on its campus, it is not entitled to campus based funding ..."[160]

In his decision Judge John C. Lifland denied FAIR's request because he reasoned they did "not established a likelihood of success on the merits of their Constitutional challenges to the Solomon Amendment."[161] Judge Lifland contended the question that the Court had to decide was if Congress "overstepped the boundaries prescribed ... by our Constitution" these boundaries had "made clearer ... with case-by-case development of Constitutional doctrines."[162] The application of those doctrines led Judge Lifland to conclude that "the compulsion exerted by the Solomon Amendment, as an exercise of Congress' spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment rights of free speech, expressive association, and academic freedom where that compulsion operates primarily to compel or limit conduct, not speech or expression, and where, to the extent speech or expression is diluted, it can be readily and freely reconstituted, thus preserving the message for propagation by all who wish to express it and to all who may hear it."[163]

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[159] Ibid., 33.

[160] Ibid

[161] United States District Court District of New Jersey, Civil Action NO: 03-4433 (JCL), http://lawlibrary.rutgers.edu/fed/html/ca03-4433-1.html (accessed September 12, 2007)

[162] Ibid

[163] Ibid

The ruling from the District Court supported the Government's position that the Solomon Amendment was a constitutionally permissive exercise of Congress's Spending Power and did not infringe on FAIR's constitutionally protected rights of 'Free Speech', or 'Freedom of Association.' FAIR appealed the decision of the District Court to the Third Circuit Court of Appeals.

Third Circuit

FAIR filed their 'Notice of Appeal' to the Third Circuit Court of Appeals on November 12, 2003.[164] The case was argued on June 30, 2004 before Circuit Judges Ambro, Aldisert, and Stapleton. Circuit Judge Ambro penned the decision and a divided panel reversed and remanded the case to the District Court to enter a preliminary injunction against the enforcement of the Solomon Amendment.[165] The opinion of the Third Circuit court was filed on November 29, 2004.[166]

The Third Circuit analysis was a complete or plenary review because the District Court's ruling was based on its application of First Amendment principles. Their First Amendment analysis was performed under "strict scrutiny" analysis and used the Supreme Court of the United States decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000) as the framework to analyze the 'Expressive Association' claim.[167]

The Third Circuit ruled that the argument presented by FAIR satisfied the three elements of an 'Expressive Association' claim. That law schools were expressive

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[164] Brief for Appellants, http://www.law.georgetown.edu/solomon/documents/CA3Brief.pdf (accessed June 27, 2006)

[165] Ibid

[166] Opinion of the Court, http://www.ca3.uscourts.gov/opinarch/034433p.pdf (accessed June 27, 2006)

[167] Ibid

associations, they believe that their message and their method of expression was impaired by the Solomon Amendment and that there was no compelling governmental interest that justified the impairment of FAIR's rights. Therefore, FAIR had a "likelihood of success on the merits of its expressive association claim against the Solomon Amendment."[168] In analyzing the 'Compelled Speech' claim, the Third Circuit ruled that military recruiting was expression and therefore, the Solomon Amendment conditioned funding on the law school's requirement to "propagate, accommodate, and subsidize the military's message."[169] It was also decided that the Solomon Amendment was not "narrowly tailored to advance its interest in recruiting."[170]

Circuit Judge Aldisert dissented concluding that the Solomon Amendment was Congress's use of its Spending Power and "fulfillment of the requirements to maintain the military under Articles I and II" and that "protecting the national security of the United States outweighs the indirect and attenuated interest in the law school's speech, expressive association and academic freedom rights."[171]

Following the decision from the Third Circuit the Government on January 14, 2005 requested "the Court stay the issuance of the mandate pending the filing and final disposition of a petition for a Writ of Certiorari" to the Supreme Court of the United States.[172]

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[168] Ibid

[169] Ibid

[170] Ibid

[171] Ibid

[172] Appellees' Motion to Stay the Mandate, http://www.law.georgetown.edu/solomon/documents/DODMotionforStay.pdf (accessed October 2, 2007)

This request was granted by the United States Court of Appeals for the Third Circuit on January 20, 2005.[173]

Petition for Writ of Certiorari

On February 28, 2005 the United States Government petitioned the U.S. Supreme Court for a Writ of Certiorari. The questions presented by the Department of Justice for Donald H. Rumsfeld, Secretary of Defense, et al. were whether the Court of Appeals erred in holding that the Solomon Amendment violated the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.[174]

In their petition the government reiterated the importance of military recruiting on college campuses because the "demands of military service have grown more complex."[175] The petition also provided the legislative judgments that the Solomon Amendment rested on:

- Restrictions on military recruiting at colleges and universities interfere with the government's constitutional ability to raise and support a military
- That equal access is critical to effective military recruiting[176]

The reasons provided to the Supreme Court of the United States to grant review of this case were that "effective recruitment is essential to sustain an all-voluntary military,

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[173] Motion by Appellees Secretary Defense, Secretary Education, Secretary HHS, Secretary Homeland and Secretary Labor to Stay the Mandate Pending a Decision of the Supreme Court., http://www.law.georgetown.edu/solomon/documents/FAIR3CirStay.pdf (accessed October 2, 2007)

[174] 04-1152 Rumsfeld, et al. v. Forum for Academic and Institutional Rights, et al., Questions Presented, http://www.supremecourtus.gov/qp/04-01152qp.pdf (accessed January 24, 2006)

[175] Petition for a Writ of Certiorari, http://www.law.georgetown.edu/solomon/documents/SGPetition.pdf (accessed June 27, 2007)

[176] Ibid., 4.

particularly in a time of war"; Congress's judgment in passing the Solomon Amendment reflected the need for "equal access to college and university campuses"[177] the injunction delivered by the Third Circuit would "undermine military recruitment during a time of war" and the Third Circuit's Constitutional analysis was "seriously flawed."[178]

The petition also reiterated that the Solomon Amendment did not implicate the 'Compelled Speech' doctrine because it only "seeks to put military recruiters in the same position as other employers, and those other employers also do not speak for the institution."[179]In addition, "the law school is free to make appropriate disclaimers or to express its disagreement with any policy of any recruiting organization."[180] The Solomon Amendment was "valid Spending Clause legislation" that established "criteria for the receipt of federal funding", and that the Solomon Amendment was "entirely indifferent to an institution's reason for denying equal access."[181]

The Solomon Amendment was addressed to conduct: "an educational institution's denial of equal access to military recruiters."[182] The amendment provided Congress with the "power to deal with the non-expressive harm to military recruiting that arises from that conduct."[183] Educational institutions had "voluntarily chosen to enter into grant agreements or contracts with the United States and to accept funds under them, subject to

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[177] Ibid., 9.

[178] Ibid., 10.

[179] Ibid., 13.

[180] Ibid

[181] Ibid., 22.

[182] Ibid., 16.

[183] Ibid., 17.

a series of conditions, such as that it not discriminate on the basis of race or disability and that it give equal access in recruiting to the United States."[184] The educational institution is "free to decline to enter into the agreements."[185] In the petition the Solomon Amendment was likened to Title IX in that it "seeks to encourage educational institutions to provide equal access; it does not seek to suppress ideas; and it permits institutions to avoid the federal condition by declining federal assistance."[186] The Government also stated that the case was "in a posture that is suitable for the Court's review because it presents important legal questions that do not depend for their resolution on further factual development."[187] Petitioners stated the "Court's decision would significantly advance the course of the litigation by clarifying the nature and scope of the inquiry."[188]

FAIR Response to Petition for Certiorari

Brief of respondents, Forum for Academic and Institutional Rights, Inc., et al. in opposition to the Petitioners was filed on March 30, 2005.[189] In their brief FAIR suggested two reasons that the Supreme Court of the United States should deny Certiorari. The first was the case presented "no novel issue" and that the Court of Appeals for the Third Circuit "reached the right result, based upon straightforward

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[184] Ibid., 15.

[185] Ibid., 20.

[186] Ibid., 23.

[187] Ibid., 25.

[188] Ibid., 26.

[189] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

application of standard Constitutional doctrine."[190] The second reason was that review by the Supreme Court was "inappropriate and unnecessary" due to the fact that the "issue nor this case, in its preliminary injunction posture, is ripe" for Supreme Court review and there was "no emergency to justify hearing the case at this point."[191]

Respondents reiterated their position that the Solomon Amendment violated their 'Freedom of Association', and placed 'Unconstitutional Conditions' on the receipt of federal funds. In their analysis if "law school faculty refuses to disseminate and support the military's recruiting message, the federal government will cancel not just funding for the law school, not just funding for recruiting, not just funding for national security or defense initiatives, but any federal funding to anyone on campus."[192] The Solomon Amendment forced law schools to "violate its own policy and actively support military recruiters."[193] The decision of the Third Circuit Court of Appeals understood that the Solomon Amendment entailed "co-opting an unwilling speaker to help disseminate the government's message."[194]

Their analysis relied on interpretation of precedent setting cases relating to 'Freedom of Association' and 'Unconstitutional Conditions' delivered by the Supreme Court of the United States. If the state of New Hampshire could not force a motorist to display the state motto on his private vehicle, *Wooley* v. *Maynard*, 430 U.S. 705 (1977) then the Solomon Amendment could not "force a private institution to display the

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[190] Brief for the Respondents in Opposition, 9, http://www.law.georgetown.edu/solomon/documents/certopp.pdf (accessed June 28, 2007)

[191] Ibid

[192] Ibid., 10.

[193] Ibid., 16.

[194] Ibid., 14.

military's literature on its bulletin boards." If the Government could not force a parade organizer to include marchers it did not want in its parade, *Hurley et al.* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al.* 515 U.S. 557 (1995), then the Solomon Amendment "may not force a private forum to admit an unwanted contingent of recruiters to unfurl its banner at an information fair." If the Supreme Court upheld that nonunion members may not be forced to pay to support political activities they did not agree with, *Abood et al. v. Detroit Board of Education et al.*, 431 U.S. 209 (1977) then the Solomon Amendment cannot "command that a private law school expend its resources promoting a recruiting message that it finds deeply offensive." According to Respondents, these precedents were applied correctly by the Third Circuit Court of Appeals and the courts holding "was virtually foreordained."[195]

Reply Brief for the Petitioners

The Reply Brief of the Petitioners was filed on April 15, 2005.[196] The Reply Brief addressed the two reasons respondents opposed the Government's Petition for Certiorari. The first reason was the Third Circuit reached the correct decision and the case presented "no novel issue."[197] The Reply argued that the reasoning of the Third Circuit was incorrect because it "enjoined the application of an Act of Congress by identifying a Constitutional right of institutions of higher education to receive Federal funding to support their educational programs, while simultaneously denying Federal recruiters

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[195] Ibid

[196] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

[197] Brief for the Respondents in Opposition, 9, http://www.law.georgetown.edu/solomon/documents/certopp.pdf (accessed June 28, 2007)

equal access to their students."[198] The holding was incorrect because the Solomon Amendment was "modest and precisely tailored to further the Government's compelling interest in recruiting the highest caliber candidates for essential military positions."[199]

The second reason identified by Respondents was that the case was in its preliminary injunction stage and there was "no emergency" to hear the case.[200] Petitioners argued that the Court should not wait for a final judgment from the District Court and review by the Court of Appeals. Petitioners identified that the "Court has repeatedly granted certiorari to review Court of Appeals decisions that have required an Act of Congress to be preliminary enjoined on Constitutional grounds."[201] Petitioners also argued that Certiorari should be granted because the case presented an issue that addressed "the power of Congress to recruit military personnel during a time of war."[202] The Supreme Court of the United States granted certiorari on May 2, 2005.[203]

Petitioners Brief on the Merits

Petitioner's brief on the merits was filed on July 15, 2005.[204] The brief provided the history of the Solomon Amendment and its legislative amendments and litigation history. The brief asserted the Solomon Amendment addressed a "serious problem" of

[198] Reply Brief for the Petitioners, 1, http://www.law.georgetown.edu/solomon/documents/2005-04-15_Reply_to_Cert_Opp.pdf (accessed February 24, 2006)

[199] Ibid., 1.

[200] Brief for the Respondents in Opposition, 9, http://www.law.georgetown.edu/solomon/documents/certopp.pdf (accessed June 28, 2007)

[201] Reply Brief for the Petitioners, 2, http://www.law.georgetown.edu/solomon/documents/2005-04-15_Reply_to_Cert_Opp.pdf (accessed February 24, 2006)

[202] Ibid

[203] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

[204] Ibid

college and universities denying military recruiters' access to their students and campuses.[205] The brief argued the Solomon Amendment was a condition on Federal funding, not a mandate and educational institutions were free "...to determine the level of access that recruiters, including military recruiters, receive."[206] The Solomon Amendment only provided an "opportunity" for the Federal government to recruit the students that it supported through Federal funding to the higher education institution.[207] The Solomon Amendment also left educational institutions "entirely free to criticize the military on whatever ground they wish."[208]

The brief then addressed the decision of the Third Circuit by analyzing the 'Associational Rights' and 'Compelled Speech' claims of Respondents and the Circuit Court's use of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The government argued that *Dale* did not support the associational rights claims because the decision in *Dale* did not support "that an educational institution may voluntarily associate with the Government's money and then claim a First Amendment right not to associate with the Government."[209] The Government pointed out that the decision in *Dale* addressed internal membership of the Boy Scouts and the issue that the Boy Scouts were being forced to convey a message contrary to its beliefs. The Government argued that the Solomon Amendment did not affect a college or universities "internal composition" because it did

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[205] Brief for the Petitioners, 11, http://www.law.georgetown.edu/solomon/documents/GovernmentPartyBrief.pdf (accessed February 24, 2006)

[206] Ibid

[207] Ibid

[208] Ibid

[209] Ibid., 12.

not make military recruiters members of the educational institution.[210] They also argued the educational institution was not required to convey any message that they disagreed with because "the speech of the recruiters remains the speech of the Government and the military – not the institution."[211] The Government also contended that educational institutions could decline federal funding and this would alleviate any compliance issues associated with the Solomon Amendment.

The brief provided four features of the Solomon Amendment that demonstrated "that it promotes the government's interest in recruiting the most talented men and women to the military while at the same time respecting the legitimate interests of educational institutions."[212] The first feature was that the Solomon Amendment was not a direct mandate. This feature provided educational institutions the option of "voluntarily" accepting federal funds understanding the condition of equal access requirement for military recruiters and declining federal funding which eliminated the requirement of providing equal access to military recruiters.[213] The second feature was that the Solomon Amendment did not "prescribe any fixed level of access…"[214] Educational institutions were only asked to provide the level of access that "the institutions deem appropriate for other employers."[215] The third feature was that the Solomon Amendment was "directly

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[210] Ibid

[211] Ibid., 13.

[212] Ibid., 16.

[213] Ibid

[214] Ibid

[215] Ibid

related to the nature of the funding that is extended."[216] The Government contended "in exchange for supporting the education of an institution's students, the Federal Government should have an equal opportunity to recruit the very students whose education it has supported."[217] The fourth feature was that the Solomon Amendment was "addressed solely to an institution's conduct in denying equal access – conduct that undermines the military's recruitment effort, particularly in a time of War."[218] This feature left educational institutions "entirely free to criticize the military directly on whatever ground they choose without any risk of the loss of federal funds."[219]

Respondents Brief on the Merits

Respondents brief on the merits was filed on September 21, 2005.[220] The brief opened with Respondents identifying the history of law schools and the AALS adopting antidiscrimination policies that included sexual orientation as a protected class. The brief identified that "Law schools have long expressed the view that discrimination is morally wrong and fundamentally incompatible with the values of the legal profession."[221] The brief asserted that law faculties "have taken a stand on one of the most divisive moral issues of our time."[222] The antidiscrimination policies of law schools were adopted to

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[216] Ibid., 17.

[217] Ibid

[218] Ibid

[219] Ibid

[220] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

[221] Brief for the Respondents, 1, http://www.law.georgetown.edu/solomon/documents/briefFAIR.pdf (accessed February 24, 2006)

[222] Ibid

"protect students from being victims of discrimination on campus."[223] Sexual orientation as a protected class under law schools antidiscrimination policies began in the 1970's.[224]

The Association of American Law Schools (AALS) adopted the "trend" in 1990 and "voted unanimously to endorse this extension."[225] Following their antidiscrimination policies and the bylaws of the AALS, law schools required all recruiters to certify that they did not discriminate on the basis of sexual orientation. The military "has an explicit policy of discriminating on the basis of sexual orientation."[226] Thus, military recruiters were not provided the "communicative services" other employers received.[227] The military recruiters were allowed "to recruit on campus on their own initiative or at the invitation of student groups."[228] Because of their antidiscrimination policies the law school would not provide "affirmative assistance" to military recruiters.[229]

The brief on the merits identified the legislative history of the Solomon Amendment and contended that the current version of the Solomon Amendment "manifests itself along two dimensions: (1) the accommodations demanded, and (2) the penalty imposed."[230] Respondents stated the penalty imposed was not just funds directed at law schools but "all federal grants and contracts directed to any branch of the

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[223] Ibid., 4.

[224] Ibid

[225] Ibid

[226] Ibid., 5.

[227] Ibid

[228] Ibid

[229] Ibid

[230] Ibid., 6.

university."[231] As the penalties increased, law schools attempted to balance the needs of military recruiters, with the bylaws of the AALS and their antidiscrimination policies.

The law schools attempted this balance by "withholding from military recruiters some of the services they offered to employers that did not discriminate."[232] Respondents contended "the disparity in services did not undermine recruiting efforts."[233] Respondents declared that there was a "glut" of qualified applicants for legal jobs in the military and there was no evidence that the law schools attempt at balance was responsible for any "shortfall" in applicants.[234] As identified in the legislative history, the Solomon Amendment was amended by Congress to require equal access for military recruiters and Respondents reasoned that law schools were required to provide "affirmative assistance" to military recruiters.[235] The brief argued that the demand of "affirmative assistance" and the "most –favored-recruiter principle" was what "triggered" the lawsuit from FAIR.[236]

The brief claimed that the Solomon Amendment infringed on three First Amendment freedoms, "the right to be free from compelled speech; the right to speak; and the freedom to associate..."[237] Respondent's argued because the Solomon Amendment required law schools to provide affirmative services to military recruiters it

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[231] Ibid

[232] Ibid., 11.

[233] Ibid

[234] Ibid

[235] Ibid

[236] Ibid., 12.

[237] Ibid., 16.

violated the doctrine of 'Compelled Speech' because the government was forcing "a private speaker to disseminate, carry, or host a message against its will."[238]

Respondents cited *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) and *Wooley v. Maynard*, 430 U.S. 705 (1977) as controlling precedent cases regarding 'Compelled Speech' claims. These cases are briefed in the "Selected Legal Cases" section of this dissertation. Respondents argued that the affirmative services provided were "communicative to the core: distributing, posting and printing literature; making introductions; and sponsoring private forums for exchange of information."[239]

The second First Amendment freedom infringed by the Solomon Amendment was the Solomon Amendment required law schools to "suspend their antidiscrimination policies."[240] This suspension of the antidiscrimination policies of the law schools conflicted with the message the law schools were conveying and teaching to their students. Respondents stated "the First Amendment protects a law school's interest not just in uttering the words, but in conveying the message as it chooses."[241] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) was cited as one of the controlling precedent cases involving the freedom to associate and supporting ideological messages. This case is briefed in the "Selected Legal Cases" section of this dissertation.

The third infringement was that the Solomon Amendment forced law schools to "collaborate with military recruiters in an effort – discriminatory recruiting – that the

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[238] Ibid

[239] Ibid

[240] Ibid

[241] Ibid., 17.

schools consider fundamentally unjust."[242] Respondents argued this requirement of the Solomon Amendment violated the law schools freedom of association and cited *Boy Scouts of America, Inc. v. Dale*, 530 U.S. 640 (2000) as one of the controlling precedent cases involving associational freedoms. This case is briefed in the "Selected Legal Cases" section of this dissertation.

The brief agreed that "military recruiting is an important, even compelling, Government interest," however, because Constitutional rights were being infringed "the Government must do more than just waft around an interest and call it a day."[243] The Respondents argued that the Government "must demonstrate that it is addressing an actual problem..." and stated "virtually no law school barred military recruiters at the gates, but merely offered them something less than most-favored-recruiter status" and "the record is devoid of evidence that undergraduate institutions have been any more inclined than law schools to bar military recruiters from campus."[244]

Reply Brief for the Petitioners

On October 26, 2005 the 'Reply Brief' for the Petitioners was submitted.[245] In their Reply Brief, Petitioners stated the "Respondents' arguments lose sight of the fact that the Solomon Amendment is not a free-standing requirement, but rather a common-sense condition on funds upon which any donor would insist."[246]

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[242] Ibid

[243] Ibid., 44.

[244] Ibid., 45.

[245] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

[246] Reply Brief for the Petitioners, 1, www.law.georgetown.edu/solomon/documents/FAIR_04-1152_reply.pdf (accessed February 24, 2006)

Petitioners' reasoned the Solomon Amendment did not compel speech or result in a 'Compelled Speech' violation because the law school and institution of higher education can "avoid the equal access requirement entirely by declining federal funds."[247] Petitioners also contended that due to the "widely inclusive recruitment programs" hosted by law schools and institutions of higher education there would be no adoption of the messages of military recruiters or any other recruiter that participated.[248] Petitioners asserted law schools and institutions of higher education were not required to adopt the messages of participating recruiters as their own. In addition, the services provided by the recruitment offices of law schools and institutions of higher education were an "inherently commercial function" where "the compelled speech doctrine has far less force."[249] Because the institution was hosting a commercial activity, finding employment for its graduates, and provided services to other employers, providing the same services for military recruiters would not result in a 'Compelled Speech' violation.

Addressing the claim of Respondent's that the Solomon Amendment violated their First Amendment rights to speak, protest and educate their students, Petitioners argued that the Solomon Amendment "leaves educational institutions entirely free to criticize the Government's policies and teach their students whatever lessons they wish."[250] The brief claimed the Solomon Amendment "does not seek to hold institutions accountable for the activities of others; nor does it seek to hold them accountable for their

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[247] Ibid

[248] Ibid., 2.

[249] Ibid., 4.

[250] Ibid., 8.

efforts to persuade others to join their cause."[251] The Solomon Amendment was concerned with the "conduct" of institutions in denying access to military recruiters and identified the "consequences" for that conduct.[252]

Petitioners Reply Brief concluded that the Solomon Amendment did not violate the First Amendment 'Right to Associate' because the institution could choose not to accept federal funding and therefore would not be required to associate with military recruiters. The brief contended "the equal access rule applies only to institutions that voluntarily accept it as a condition on federal funding."[253] Petitioners stated "an institution may not voluntarily associate itself with the Government's money and then credibly claim that it has a right not to associate with the Government..."[254]

Amicus Curiae Briefs

Amicus Curiae Briefs are submitted by "someone not a party to the lawsuit, to give the court information needed to make a proper decision, or to urge a particular result on behalf of the public interest or of a private interest of third parties who will be indirectly affected by the resolution of the dispute."[255] Twenty-seven *Amicus Curiae* briefs were filed, twelve in support of the Petitioners, thirteen in support of the Respondents, and two in support of neither party.[256] Listed below, in alphabetical order, are the Petitioners, Respondents, and support of neither party *Amicus Curiae* Briefs. A

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[251] Ibid., 9.

[252] Ibid

[253] Ibid., 12.

[254] Ibid

[255] Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, Minnesota: West Group, 2004)

[256] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

summary of each brief is provided that identifies the party name, their interest in amicus and the significant points identified in their briefs.

Petitioners Amicus Briefs

Amicus the American Civil Rights Union (ACRU)

The American Civil Rights Union "was established in 1998 as a Section 501 c (3) educational and legal charity dedicated to basic Constitutional issues."[257] They identified their interest in the case as "two-fold."[258] Their first interest was the applied interpretation by the Third Circuit Court of the Supreme Court of the United States decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). They argued that the Circuit Court "misinterpreted and misapplied" the decision in *Dale*.[259] The decision in *Dale* affirmed the associational rights of the Boy Scouts by not allowing a state law to affect the membership decisions of the Boy Scouts organization. Under the state law the Boy Scouts were required to associate and include as a member an openly homosexual individual. Amici contended the law schools that comprised FAIR were not "forced to associate" with the message of the military because they "...are entirely free to refuse access to recruiters, so long as they choose not to accept the hundreds of millions of dollars in federal aid to themselves and their universities."[260]

Their second interest was the decision of the Third Circuit seriously implicated the "War Powers provisions of the Constitution and related military provisions of the US

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[257] Brief of *Amicus Curiae* The American Civil Rights Union, 1, http://www.law.georgetown.edu/solomon/documents/amicusCRU.pdf (accessed August 15, 2007)

[258] Ibid., 2.

[259] Ibid

[260] Ibid., 15.

Code."[261] Because the Third Circuit Court decision was "instruct[ing] the military how it must conduct the recruitment of its (all voluntary) personnel, in time of war."[262] They reasoned this case was about the "Spending Power" provisions of Congress and the "establishment and conduct of the American military."[263] *South Dakota v. Dole* 483 U.S. 203 (1987) was cited by Amici as precedent on Congress's Spending Authority. *South Dakota v. Dole* involved the withholding of certain federal highway funds from States that had a minimum legal drinking age of less than twenty-one years. South Dakota had a legal minimum drinking age of nineteen years and would lose 5% of certain federal highway funds unless they changed their minimum drinking age to twenty-one years.[264]

South Dakota sued the Secretary of Transportation and argued that the condition of changing its minimum drinking age to twenty-one years of age violated the Spending Clause provisions of the Constitution and also violated the Twenty-first Amendment of the Constitution which grants States the power to legislate regarding the importation, distribution and sale of liquor.[265]

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[261] Ibid., 2.

[262] Ibid

[263] Ibid., 3.

[264] South Dakota v. Dole, 483 U.S. 203 (1987). http://supreme.justia.com/us/483/203/case.html (accessed May 28, 2007)

[265] U.S. Constitution, amend. 21, Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress. Effect of Repeal. http://caselaw.lp.findlaw.com/data/constitution/amendment21/ (accessed May 27, 2007)

South Dakota lost at both the District and Eight Circuit courts and the case went to the Supreme Court of the United States. The Supreme Court affirmed the decisions of the lower courts and established a four-part requirement for the conditional spending of federal funds. 1) Federal spending must be in pursuit of the general welfare, 2) the conditions must be unambiguous, 3) the condition must be related to the federal program, 4) other constitutional provisions do not provide an independent bar to the conditional grant of federal funds.[266]

Amicus The American Legion

The American Legion "is the largest veteran's organization in the United States, comprising more than 2,600,000 current and former members of our Armed Forces."[267] Amici argued that Congress had "the discretion to withhold certain federal funds" from higher education institutions that prevented or interfered with the military's ability to recruit.[268] This argument was based on Amici's interpretation of Art. 1 § 8 of the U.S. Constitution and the Court's ruling in *South Dakota v. Dole* 483 U.S 203 (1987). Amici stated that "Recruiting is the lifeblood of our modern, all-volunteer military."[269] The American Legion was concerned that if the Solomon Amendment was found unconstitutional then "schools would be able to prohibit military recruiting based on nothing more than an objection to a particular law or military policy, or even a mere

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[266] South Dakota v. Dole, 483 U.S. 203 (1987), 206-208.

[267] Brief of *Amicus Curiae* The American Legion, 1, http://www.law.georgetown.edu/solomon/documents/amicusAmerLegion.pdf (accessed August 15, 2007)

[268] Ibid., 2.

[269] Ibid

whim, and yet continue to receive taxpayer funding."[270] The American Legion argued that the Solomon Amendment was "an appropriate exercise of the Constitutional powers granted Congress with respect to the military, and deserves the deference this Court traditionally affords the Congressional judgments in matters of military affairs and national security."[271]

Amicus Boy Scouts of America

The Boy Scouts of America "is a nonprofit membership organization with the mission of instilling in young people the values of the Scout Oath and Law."[272] The Boy Scouts identified two reasons for their interest in amicus.

1. That both the letter and the intent of the ruling in *Dale* be upheld.
2. The Government's position is best considered by analogy to the public forum doctrine.[273]

The Boy Scouts argued that there was nothing in the Supreme Court of the United States ruling in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) that would "invalidate the Solomon Amendment."[274] They argued that unlike *Dale*, "military recruiters and other employers do not seek to become anything akin to members, leaders, or representatives of law schools."[275] Military recruiters and the law schools would remain "separate organizations with their own goals and expression" which would allow the law

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[270] Ibid., 4.

[271] Ibid

[272] Brief of *Amicus Curiae* Boy Scouts of America, 1, http://www.law.georgetown.edu/solomon/documents/amicusBoyScouts.pdf (accessed August 15, 2007)

[273] Ibid., 2.

[274] Ibid., 4.

[275] Ibid., 6.

schools to "issue any statement they wish critical of the military or its policies."[276] Amici asserted the law schools created "an open forum for employers" therefore, there was no infringement on First Amendment protected speech or expressive association.[277] Amici also reiterated that the employment practices of the military were "entirely lawful."[278]

Amicus the Center for Individual Rights (CIR)

The CIR identified themselves as a "non-profit public interest law firm, founded in 1989 to provide free legal representation to deserving clients who cannot otherwise afford legal counsel."[279] The CIR also asserted that they were interested "in furthering academic freedom on law school campuses, and halting the imposition by law school administrations and faculty on what they believe to be politically-correct views on each and every student, who should have the academic freedom to decide for themselves what they wish to hear and accept."[280]

They argued that the Third Circuit Court of Appeals "fallaciously construed academic freedom as the college administration's right to impose its views on the student body, even though various students seek to hear or express contrary views."[281] They contended that college students were the beneficiaries of academic freedom and the Solomon Amendment "enhances academic freedom of students by conditioning the grant of federal funds on permitting students to choose to hear the military recruiter's

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[276] Ibid., 10.

[277] Ibid., 16.

[278] Ibid., 17.

[279] Brief of *Amicus Curiae* Center for Individual Rights, 1, http://www.law.georgetown.edu/solomon/Documents/CenterIndRts.pdf (accessed August 15, 2007)

[280] Ibid

[281] Ibid., 11.

message."[282] Amici argued that the law schools created an open forum and cited *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995) as precedent for their argument.

Rosenberger v. Rector involved the use of mandatory student fees to support the printing of publications for student groups at the University of Virginia. Wide Awake Productions was a student group that published a student newspaper involving religious beliefs and the University of Virginia withheld payment to a printer because the newspaper promoted particular religious beliefs which were prohibited by the University Guidelines on the use of mandatory student fees. The student group sued the University of Virginia alleging that the refusal of payment violated their 'Freedom of Speech.' The District and Fourth Circuit Court of Appeals ruled in favor of the University and reasoned that the University's viewpoint discrimination in refusing payment violated the Speech Clause, however, due to compliance with the Establishment clause the discrimination was justified.[283]

The Supreme Court of the United States reversed the Court of Appeals decision and ruled that the University guidelines and refusal of payment violated the First Amendment principles governing speech in limited public forums. The Court ruled that the University could not discriminate based on the viewpoint of "private persons whose speech it subsidizes."[284]

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[282] Ibid., 30.

[283] Rosenberger et al. v. Rector and Visitors of University of Virginia et al., 515 U.S. 819 (1995), 819-822, http://supreme.justia.com/us/515/819/case.html (accessed June 2, 2007)

[284] Ibid

Amicus The Claremont Institute

The Claremont Institute "is a non-profit educational foundation whose stated mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life ..."[285] They argued that Federal spending on education was "pressing the limits" of the Spending Clause powers of Congress because the Spending Clause was for "matters of national or general concern as opposed to purely local concern."[286] Amici argued that Federal funding of higher education was "clearly unconstitutional under the original understanding of the Spending Clause."[287] The only permissible Federal spending for higher education institutions would be those funds "...directly tied to Congress's efforts to raise and support Armies."[288] Therefore the Solomon Amendment was not a "restriction" or "penalty" on Federal funding, it was the "nexus" that made Federal spending on higher education "permissible."[289]

Amicus Eagle Forum Education and Legal Defense Fund

The Eagle Forum Education and Legal Defense Fund is "an Illinois nonprofit corporation" that "has long advocated judicial restraint and separation of powers."[290] Their brief centered on the powers of Congress to attach conditions on Federal funding. Amici argued that Art. 1 § 8 "confers on Congress the full and exclusive authority over

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[285] Brief of *Amicus Curiae* The Claremont Institute, 1, http://www.law.georgetown.edu/solomon/documents/amicusClaremont.pdf (accessed August 15, 2007)

[286] Ibid

[287] Ibid., 9.

[288] Ibid., 3.

[289] Ibid

[290] Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund, I, http://www.law.georgetown.edu/solomon/documents/amicusEagleForum.pdf (accessed August 18, 2007)

the spending of Federal money."[291] Amici cited *Rust v. Sullivan*, 500 U.S. 173 (1991) as precedent in the government's ability to "fund some activities but not others."[292] Amici stated that it was "inconsistent with separation of powers for the judiciary to dictate to Congress how it may and may not spend money."[293]

Rust v. Sullivan involved the use of Federal funding for family planning services. The funding for family planning services prohibited doctors from counseling and referring patients for abortions as a method of family planning. The doctors and Title X grantees filed suit alleging violation of their 'Freedom of Speech' and 'Viewpoint Discrimination.'[294] The District Court and the Court of Appeals for the Second Circuit ruled in favor of the Secretary of Health and Human Services. The Supreme Court of the United States affirmed the decision of the Court of Appeals and ruled that Congress did not discriminate based on viewpoint but chose to support family planning services and not abortion related activities.[295]

They also cited *South Dakota v Dole* and *United States v. American Library Association*, 539 U.S. 194 as precedents on Congress's power to condition federal funds. *United States v. American Library Association* involved the conditioning of Federal funds to public libraries that installed Internet filters to protect minors from illegal pornography. Public libraries were required to install Internet filters to be eligible for

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[291] Ibid., 3.

[292] Ibid., 4.

[293] Ibid., 3.

[294] Rust v. Sullivan, 500 U.S. 173 (1990), 183-191, http://supreme.justia.com/us/500/173/case.html (accessed May 24, 2007)

[295] Ibid

Federal funding and discounts associated with the Erate program and grants under the Library Services and Technology Act (LSTA).[296] The American Library Association (ALA) sued the United States challenging the constitutionality of the filtering requirements. The District Court ruled in favor of the ALA and held that Congress exceeded its Spending Clause authority and the filtering requirement was a content-based restriction to a public forum. The Supreme Court of the United States reversed the judgment of the District Court and ruled that the filtering requirement was a valid exercise of Congress's powers under the Spending Clause in furthering its policy objectives.[297]

Amicus the Judge Advocates Association (JAA)

Amici identified themselves as a "non-profit corporation and national professional society."[298] Their asserted interest in amicus was to "demonstrate that the application of the Solomon Amendment is a constitutional and highly effective means of recruiting quality law students to the Judge Advocate General's Corps."[299] The JAA argued that the Solomon Amendment was "a valid exercise on Congress's spending power so long as the conditions it places on the law schools do not rise to the level of an independent constitutional violation."[300] Their argument was based on Amici's interpretation of Art. 1 § 8 of the U.S. Constitution and the precedent set in *South Dakota v. Dole*. Amici stated

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[296] United States et al. v. American Library Association, Inc., et al., 539 U.S. 194, 203-209, http://supreme.justia.com/us/539/194/case.html (accessed May 28, 2007)

[297] Ibid

[298] Brief of *Amicus Curiae* The Judge Advocates Association, 1, http://www.law.georgetown.edu/solomon/Documents/JAGBrief.pdf (accessed August 18, 2007)

[299] Ibid., 2.

[300] Ibid., 5.

that due to the war in Iraq and other calls for duty of the United States Military that the demand for Judge Advocates had "dramatically increased."[301] Amici proposed a question about where "selfless young men and women" are found?[302] The answer provided was that these men and women were found at law schools where they are instilled with the "public service ethic and skills necessary for protection and defense of freedom, on the battlefield and off."[303] Amici also identified that Congress established the requirement that Judge Advocates had to be graduates of an accredited law school.[304]

Amici also identified two "crucial" reasons for on-campus interviews. The first was to have a "face-to-face forum where law students can hear firsthand the experience of a young Judge Advocate in today's military as well as ask questions about military law, how it differs from civilian law, and the application process."[305] The second was that the recruiting Judge Advocate would be able to "make an initial, face-to-face evaluation and assessment of the demeanor and character of the potential applicant..."[306] Amici also argued that other means of recruiting would be costly and during this time of war funding should be directed "where it is needed the most – on the frontlines."[307]

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[301] Ibid., 9.

[302] Ibid., 10.

[303] Ibid

[304] Ibid., 12.

[305] Ibid., 15.

[306] Ibid

[307] Ibid., 18.

Amicus Law Professors and Law Students

Amici were law professors and law students that argued that the opinion delivered by the Third Circuit Court of Appeals "severely compromised" the rights of those law students that were "denied the information necessary to evaluate a legal career in the military."[308] They also argued that the Third Circuit's judgment worked in opposition to one of the "core" missions of higher education institutions, which is "promoting the free and open exchange of ideas."[309] Amici argued that the Solomon Amendment met the Spending Clause requirements established in *South Dakota v. Dole* on conditioning Federal funding. They also cited *United States v. American Library Association* as precedent in the conditioning of Federal funding. Amici were also concerned that if the Solomon Amendment was found unconstitutional that it would "undermine longstanding civil rights laws that contain language analogous to the Solomon Amendment."[310] Amici claimed Title VI which addresses discrimination on the basis of race, color or national origin and Title IX which address discrimination on the basis of sex contained similar language to that of the Solomon Amendment.

Amicus Brief of Amicus Curiae Adm. Charles S. Abbot, Lt. Gen. Daniel W. Christman, Gen. Wesley K. Clark, Adm. Archie Clemins, et al.,

Amici Admiral Charles S. Abbott, Lieutenant General Daniel W. Christman, General Wesley K. Clark, and Admiral Archie Clemins et al. were former senior U.S.

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[308] Brief of *Amicus Curiae* Law Professors and Law Students, 1, http://www.law.georgetown.edu/solomon/documents/amicusLawProfs.pdf (accessed August 18, 2007)

[309] Ibid., 5.

[310] Ibid., 21.

military officers.[311] Their interest in amicus was to "emphasize the critical role played by on-campus recruiting in meeting the personnel requirements of an all-volunteer military."[312] Amici argued that without the ability to recruit college and university students that the military would not be able to "maintain the high quality of its officer corps."[313] They claimed the Solomon Amendment was Congress's "express judgment that on-campus recruiting is essential to maintaining an all-volunteer force."[314] Amici also stated "major law firms and corporations find it essential to recruit on campus and devote hundreds of thousands of dollars and thousands of hours to that process."[315] Therefore, denying military recruiters equal access to campuses would put the armed forces "at a serious – in many cases decisive – competitive disadvantage."[316] Amici contended "the educational institutions own actions thus furnish the evidentiary basis finding that access to campus is essential for effective recruiting, and that denial of that access undermines an essential aspect of raising a military."[317]

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[311] Brief of Amicus Curiae Adm. Charles S. Abbot, Lt. Gen. Daniel W. Christman, Gen. Wesley K. Clark, Adm. Archie Clemins, et al., 1, http://www.law.georgetown.edu/solomon/documents/amicusMilitary.pdf (accessed August 18, 2007)

[312] Ibid., 2.

[313] Ibid., 13.

[314] Ibid., 14.

[315] Ibid., 19.

[316] Ibid

[317] Ibid., 29.

Amicus National Legal Foundation (NLF)

The NLF is a "501 c(3) public interest law firm."[318] Amici contended that the Third Circuit's judgment ignored "binding precedent" and rested its judgment on the analysis of *Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) when the proper cases for analyzing the issues involved in this case were *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) and *Rust v. Sullivan*, 500 U.S. 173 (1991).[319] NLF stated that the Solomon Amendment did not "penalize universities" or "deny them the right to speak out against the military's homosexual conduct policy" it "simply reflects Congress' decision not to subsidize their doing so."[320]

Amicus Congressman Richard Pombo et al.

Congressman Richard Pombo was a co-sponsor of the Solomon Amendment.[321] He was joined in amicus by, Elizabeth Rizzo, Rutgers University School of Law, David Wasserman Seton Hall University Law School, and Daniel L. Stants, Duquesne University School of Law.[322] Amici argued the Third Circuit's decision conflicted with the "right of Congressman Pombo and other members of Congress to represent the political will of their constituents..."[323] Amici contended the Third Circuit decision

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[318] Brief of *Amicus Curiae* The National Legal Foundation, 1, http://www.law.georgetown.edu/solomon/documents/amicusNLF.pdf (accessed August 18, 2007)

[319] Ibid., 2.

[320] Ibid., 10.

[321] Brief of *Amicus Curiae* U.S. Congressman Richard Pombo, 1, http://www.law.georgetown.edu/solomon/documents/amicusPombo.pdf (accessed August 18, 2007)

[322] Ibid., 2.

[323] Ibid., 10.

should be reversed because it would "restore the only means by which taxpayers may limit or direct spending through their elected representatives; protect the rights of Congressional Members to represent properly the fiscal and political interest of their constituents and to legislate on matters of vital public policy."[324] The reversal would also restore the "denied associational rights of students and potential employers at federally funded state and private schools."[325] Amici stated that the balancing of Congress's rights enumerated in the Constitution to raise and army against Respondents First Amendment rights "tips heavily in favor of Congress."[326]

Brief of Texas, Alabama, Colorado, Delaware, Florida, Indiana, Kansas, Michigan, South Dakota, Utah, and West Virginia

Amici contended that restrictions on the United States Military recruiting on college and university campuses would have "similar adverse consequences for National Guard units across our country."[327] They also pointed out there were many state laws that linked public funding to college and university conduct related to "admissions, courses offered, course credits issued, accreditation and recruitment."[328] Amici claimed the Third Circuit ruling "could encourage challenges to a variety of state laws relating to the operation of in-state institutions of higher education."[329] The Amici States contended the

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[324] Ibid., 3.

[325] Ibid., 3.

[326] Ibid

[327] Brief of *Amicus Curiae* Texas, Alabama, Colorado, Delaware, Florida, Indiana, Kansas, Michigan, South Dakota, Utah, and West Virginia, 1, http://www.law.georgetown.edu/solomon/documents/amicusStates.pdf (accessed August 18, 2007)

[328] Ibid., 1.

[329] Ibid., 4.

Solomon Amendment imposed a "modest requirement" on higher education institutions that chose "to receive specified federal funds."[330] They argued the Solomon Amendment did not "suppress expression" against the military's policy regarding homosexuals, it "nurtured a good deal of such expression."[331]

Petitioners *Amicus Curiae* Briefs Summary

The Petitioners *Amicus Curiae* Briefs centered on the rights of Congress as prescribed in Art. 1 § 8 to raise and support a military and Congress's ability to attach conditions on the receipt of Federal funding. Amici cited *South Dakota v. Dole* and *United States v. American Library Association* as precedent setting cases involving the conditioning of federal funds. Amici also contended that the expressive association precedent setting cases of *Boy Scouts v. Dale* and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* did not apply to this case because the Solomon Amendment did not require membership to the organization as it did in these cases.

The brief submitted by The American Legion was well organized and emphasized the need for soldiers to be educated at institutions of higher education. Their brief claimed that the current United States conflicts abroad required "civilian trained officers" that had the "educational backgrounds necessary to address our modern national security challenges."[332] They stated "by virtue of having been educated in civilian institutions, these officers bring a perspective and values to military service that complement and counterbalance, the worldview brought to the service by professional officers graduated

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[330] Ibid., 17.

[331] Ibid

[332] Brief of Amicus Curiae The American Legion, 12, http://www.law.georgetown.edu/solomon/documents/amicusAmerLegion.pdf (accessed August 15, 2007)

from the academies."[333] The American Legion contended a "well-rounded JAG Corps" required the diversity of knowledge gained at institutions of higher education. This reasoning suggests there is a symbiotic relationship between the Federal government and institutions of higher education.

The brief from the Claremont Institute provided the most interesting interpretation of the Solomon Amendment. The Claremont Institute contended the Solomon Amendment was the "nexus" that constitutionally allowed the Federal Government to spend funds at institutions of higher education.[334] Under their interpretation of the United States Constitution and the Spending Clause, without the Solomon Amendment, the government funding of institutions of higher education was unconstitutional. The funding of higher education was unconstitutional because Federal spending under the Spending Clause was limited to those causes that provided for the general welfare of society and it was reasoned that higher education was not for the general welfare.

The brief submitted by Congressman Richard Pombo echoed the theory presented by Jeffrey Rosen by requesting the Court to overturn the Third Circuit's decision and "protect the rights of Congressional Members to represent properly the fiscal and political interest of their constituents and to legislate on matters of vital public policy."[335] The brief requested the Court to support the will of Congress as a representative of the will of the majority. Congressman Pombo's request to the Court to support the will of Congress, and

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[333] Brief of Amicus Curiae The American Legion, 3, http://www.law.georgetown.edu/solomon/documents/amicusAmerLegion.pdf (accessed August 15, 2007)

[334] Brief of *Amicus Curiae* The Claremont Institute, 3, http://www.law.georgetown.edu/solomon/documents/amicusClaremont.pdf (accessed August 15, 2007)

[335] Brief of *Amicus Curiae* U.S. Congressman Richard Pombo, 3, http://www.law.georgetown.edu/solomon/documents/amicusPombo.pdf (accessed August 18, 2007)

under Rosen's theory, the will of the majority, supports Rosen's theory that the Court supports the will of the majority and not the minority.

Respondents Amicus Briefs

Amicus the American Association of University Professors (AAUP)

"The AAUP is an organization of approximately 45,000 university faculty members and research scholars in every academic discipline, including law, dedicated to advancing the values of higher education."[336] The AAUP identifies as one of its principal tasks is "the formulation of national standards for the protection of academic freedom.[337] The AAUP's interest in this case centered on academic freedom and protection against discrimination in a university setting.

They viewed the major issue as whether the "First Amendment permits the Federal Government to condition the entire flow of Federal funding to universities for teaching and research on the requirement that every "subelement" within the university give recruiters from the United States military the same access to its career placement program as it gives to other employers."[338] The AAUP contended that this interpretation of the Solomon Amendment would "directly interfere with academic freedom long protected by the First Amendment."[339]

Amici asserted because the Solomon Amendment "provides no funds for career services activities, and military recruiting at law schools is unrelated to the reasons the

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[336] Brief of *Amicus Curiae* The American Association of University Professors, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusAAUP.pdf (accessed August 9, 2007)

[337] Ibid

[338] Ibid., 3.

[339] Ibid

National Institutes of Health provide scientists funding for infectious disease research or the Education Department provides teachers in training subsidies for bilingual education" it affected the academic freedom of the faculty and the institution and "exceeds the legitimate scope of the government's spending discretion to earmark funds for particular purposes."[340] The AAUP contended that academic freedom "extends to faculty decision-making beyond teaching and research construed narrowly."[341] Amici also contended that academic freedom "extends also to admissions, extracurricular activities, evaluation criteria, and the academic values that universities seek to impart to their students throughout the educational environment."[342]

The AAUP cited *Rust v. Sullivan*, 500 U.S. 173 (1991) and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) as two legal precedents of the Court supporting academic freedom. In Rust the Court stated institutions of higher education are "a traditional sphere of free expression" and academic freedom is "fundamental to the functioning of our society."[343] In *Rosenberger* the Court stated "[I]n the University setting, ...the [government] acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[344] The Solomon Amendment as interpreted by the AAUP interfered with

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[340] Ibid., 6.

[341] Ibid., 8.

[342] Ibid., 9.

[343] Ibid., 10, citing Rust v. Sullivan 500 U.S. 173, 200 (1991)

[344] Ibid., 10, Citing Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 835 (1995)

"faculties' ability to determine the professional standards and values that they will impart to their students and to utilize the most effective mechanisms for doing so."[345]

Amicus the American Civil Liberties Union (ACLU), Gay & Lesbian Advocates & Defenders, Lambda Legal Defense and Education Fund, Inc., National Center for Lesbian Rights, and People for the American Way Foundation

"The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 400,000 members that is dedicated to defending the principles embodied in the Constitution, including those guaranteeing freedom of expression."[346] The ACLU and its fellow Amici were most concerned with the "government(s) efforts to compel a speaker to participate in the dissemination of a favored government message.[347] They argued the Solomon Amendment required law schools to disseminate the recruitment message of the military and this violated the law schools First Amendment right to choose the content of their message. Amici cited *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) and *Wooley v. Maynard,* 430 U.S. 705 (1977) as precedent setting cases associated with 'Freedom of Speech' and 'Association.'

Hurley involved the rights of a parade organizer to select groups to march in a parade. The Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) applied to participate in the St. Patrick's Day- Evacuation Day parade organized by the South Boston Allied War Veterans Council and the council denied the application from GLIB.

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[345] Ibid., 14.

[346] Brief of *Amicus Curiae* The American Civil Liberties Union, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusACLU.pdf (accessed August 9, 2007)

[347] Ibid., 1.

GLIB sued the Council and the city of Boston alleging violation of a Massachusetts law that prohibited sexual orientation discrimination in places of public accommodation. The state trial court ruled in favor of GLIB and ruled that the parade was considered a public accommodation. The court rejected the Council's claim that the parade was private and denial of GLIB's request to participate in the parade infringed on the Council's 'Expressive Association' rights protected under the First Amendment. The Supreme Judicial Court of Massachusetts affirmed the decision of the trial court and ruled that GLIB was excluded from the parade because of their sexual orientation and that there was no expressive purpose in the parade.[348]

The Supreme Court of the United States reversed the decision of the Supreme Judicial Court of Massachusetts and ruled that the parade was the expressive message conveyed by the private organizers of the parade. The Court ruled that the parade organizers had the right to tailor its speech and choose the content of its message.[349]

Wooley involved a New Hampshire statute that required motor vehicle license plates to display the state motto "Live Free or Die." George Maynard was a Jehovah's Witness and due to his religious beliefs covered up the motto on the license plates of his personal vehicle. Maynard was fined on three separate occasions for violating the statute and was sentenced to serve fifteen days in jail. Maynard brought suit in United States District Court for the District of New Hampshire seeking injunctive and declaratory relief against enforcement of the New Hampshire statute. The District Court enjoined the State from arresting and prosecuting the Maynards' for covering their license plates. The

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[348] Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., 515 U.S. 557, 566-581, http://supreme.justia.com/us/515/557/case.html (accessed May 24, 2007)

[349] Ibid

Supreme Court of the United States affirmed the District Court's ruling and ruled that the State of New Hampshire could not constitutionally require an individual to display the State's motto on their personal vehicle if the owners of the vehicle find the message unacceptable.[350]

Amicus the Association of American Law Schools (AALS)

The AALS is a "non-profit educational organization that was formed in 1900 and serves the legal community as a learned society of law teachers and is legal education's principal representative to the federal government and to other higher education organizations and learned societies."[351] AALS membership standards require that member schools pursue policies that ensure their students' equal opportunity and nondiscrimination on the basis of sexual orientation. "Of the 188 law schools accredited by the American Bar Association (ABA) in this country, 166 currently meet AALS standards of membership and are AALS members."[352] Their brief centered on "AALS policy and the nondiscrimination obligations of AALS member law schools."[353] They also explained their position on the "amelioration policy" and made clear that "its amelioration policy is not an adequate substitute, either factually or as a legal matter, for a true nondiscrimination requirement."[354] Amici contended that the amelioration policy

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[350] Wooley v. Maynard, 430 U. S. 705 (1977), 711-719, http://supreme.justia.com/us/430/705/case.html (accessed May 28, 2007)

[351] Brief of *Amicus Curiae* The Association of American Law Schools, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusAALS.pdf (accessed August 9, 2007)

[352] Ibid., 1.

[353] Ibid

[354] Ibid., 2.

"still permits law schools to facilitate discrimination based on sexual orientation" which was in noncompliance of the AALS Bylaws and membership standards.[355]

The AALS asserted the Solomon Amendment violated the expressive and associational rights of AALS members. AALS members were being "coerced" to provide equal access and assistance to military recruiters.[356] This coerced access and assistance restricted AALS members from conveying their message of nondiscrimination. Amici cited *Dale* and *Hurley* as controlling precedent of expressive and associational rights.

Amicus Bay Area Lawyers for Individual Freedom, Human Rights Campaign, and Legal Momentum (BALiF)

"Bay Area Lawyers for Individual Freedom (BALiF) is the nation's oldest and largest bar association of Lesbians, Gay Men, Bisexuals, and Transgendered persons (LGBT) in the field of law."[357] Their brief centered on the limits of constitutional conditions of federal funding. Amici cited *Rust v. Sullivan* as a precedent setting case on the limits of federal funding conditions to a particular program. Amici stated that the ruling in *Rust* "made clear that the receipt of federal funds was tied to the particular program that Congress intended to further and was not conditioned on how the recipient spent other funds."[358] In support of this interpretation Amici provided an example that the government could not provide funding for a program on cancer research to an institution of higher education and then change the grant to identify that the program was "to

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[355] Ibid., 10.

[356] Ibid., 16.

[357] Brief of *Amicus Curiae* The Bay Area Lawyers for Individual Freedom, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusBALIF.pdf (accessed August 9, 2007)

[358] Ibid., 13, citing Rust 500 U.S. at 199

develop cures for cancer at academic institutions that allow military recruiting."[359] Amici claimed the Solomon Amendment was "a condition attached to hundreds of discrete spending programs that have nothing at all to do with the recruitment of lawyers for the military."[360]

Amici stated the "withholding of funds is not an end in itself, but rather is being used to coerce academic institutions to speak for and associate with a discriminatory employer."[361] Amici contended the member law schools of FAIR were not allowed to enforce their nondiscrimination policies against military recruiters, therefore their speech was infringed and they had to adopt the government's message. BALiF stated the "events surrounding the Solomon Amendment's passage also confirm that the statute was intended to suppress a particular point of view."[362] Under Amici's interpretation, the Solomon Amendment denied institutions of higher education a "benefit" if the institution exercised its First Amendment right "to refuse, or allows one of its components to refuse, to speak on behalf of and associate with employers that discriminate on the basis of irrelevant personal characteristics."[363] Amici stated that withholding Federal funding to institutions to increase access of military recruiting was "the blunt instrument of unconstitutional coercion."[364]

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[359] Ibid., 13.

[360] Ibid., 14.

[361] Ibid., 6.

[362] Ibid., 4.

[363] Ibid., 9.

[364] Ibid., 6.

Amicus Robert A. Burt, et al.

This brief was from "the majority of faculty of the Yale Law School."[365] Amici "believed that the Yale Law School should not exclude any speakers from speaking or prevent any point of view from being aired within the school."[366] Amici stated "the Government should not now be allowed to use its money to coerce Yale Law Faculty Members into associating with its discriminatory hiring practices against some Yale Law students."[367] Amici provided the arrangements between the Department of Defense (DoD) and Yale Law School in addressing military recruiting. Military recruiters were "provided with access to students and information sufficient for recruitment needs."[368] Military recruiters were "free to schedule interviews with interested students at the private hotel at the same time that other employers are interviewing Yale law students."[369] Military recruiters were "free to initiate contact with student organizations and meet with any interested students at the organization's invitation at any available space on the Yale campus."[370] These arrangements were without "protest for over 20 years from 1978-2001."[371]

Amici claimed that the government was ignoring what this case was really about which was the "law schools' efforts to rid the legal profession of base discrimination

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[365] Brief of *Amicus Curiae* Robert A. Burt, et al., 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusBurt.pdf (accessed August 9, 2007)

[366] Ibid

[367] Ibid., 3.

[368] Ibid., 6.

[369] Ibid

[370] Ibid

[371] Ibid

against gays, lesbians and bisexuals."[372] Amici stated that they refused "to assist or to associate with the DoD's discrimination against their gay, lesbian and bisexual students in hopes that one day, all of their students can pursue military service based on merit and free from discrimination."[373]

Amici cited *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) as precedent in protecting the faculty members First Amendment rights of "refusal to cooperate with or assist, to disassociate from, and thereby to protest against, the military's discrimination against their gay, lesbian and bisexual students."[374] Claiborne involved the National Association for the Advancement of Colored People (NAACP) boycotting white merchants in Claiborne County, Mississippi in 1966. The purpose of the boycott was to demand racial equality and justice and was mostly supported by nonviolent speeches and picketing. In 1969, white merchants filed suit in Mississippi Chancery Court requesting injunctive relief and damages against the NAACP for lost earnings from 1966 – 1972.[375]

The Chancery Court found in favor of the merchants and issued liability for damages and an injunction against the NAACP. The Mississippi Supreme Court held that the entire boycott was illegal and affirmed the liability for damages against the NAACP. The Supreme Court of the United States reversed the decision of the lower courts and ruled that the NAACP's nonviolent activities of speech, assembly, association and

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[372] Ibid., 14.

[373] Ibid., 13.

[374] Ibid., 14.

[375] NAACP V. Claiborne Hardware Co., 458 U. S. 886 (1982), 907-932, http://supreme.justia.com/us/458/886/ (accessed March 20, 2007)

petition were protected by the First Amendment and the NAACP was not liable for the consequences of their nonviolent activities.[376] Amici contended that the ruling in Claiborne supported their "constitutionally protected right of disassociation."[377]

Amicus the Cato Institute

"The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government."[378] Their brief centered on the "limits of the federal government's power when seeking to intrude upon a private institution's First Amendment rights to freely associate and advocate its views..."[379] Amici cited *Dale* and *Hurley* as precedents in support of their argument that law schools as "private institutions" should be protected under the First Amendment to convey their message of nondiscrimination.[380] Amici asserted it was "no business of the Court, or the state, to tell private law schools what their message should be, it is also no business of the Court, or the state, to tell law schools how to best convey their message."[381] Amici stated that the Government was requesting, in effect, that the Court provide a decision to "substitute its judgment (Government) about how to educate students for that of the Respondents (law

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[376] Ibid

[377] Brief of *Amicus Curiae* Robert A. Burt, et al., 15, http://www.law.georgetown.edu/solomon/documents/FAIRamicusBurt.pdf (accessed August 9, 2007)

[378] Brief of *Amicus Curiae* The Cato Institute, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusCato.pdf (accessed August 10, 2007)

[379] Ibid., 1.

[380] Ibid

[381] Ibid., 2.

schools)."[382] Amici contended that applying the Solomon Amendment would "force the law schools to forgo their message that discrimination in employment is wrong, it would create the situation where the law schools will be compelled to speak in order to counteract the government's message."[383]

Amicus for Columbia University, Cornell University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University

Amici were all private universities that receive federal funding for scientific and medical research.[384] Amici identified the essential nature of federal grants to their universities and the understanding that federal grants and contracts have conditions. The question raised was the "reasonable limits on the ability of the federal government to use the coercive power of massive research funding to intrude on academic freedom."[385] Under Amici's interpretation of the Solomon Amendment, universities had "no choice but to comply."[386] Amici reasoned that the Solomon Amendment was "a command rather than an inducement" and "the conditions it imposes on receipt of a broad array of federal

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[382] Ibid., 12.

[383] Ibid., 15.

[384] Brief of *Amicus Curiae* Columbia University, Cornell University, Harvard University, New York University, The University of Chicago, The University of Pennsylvania, and Yale University, 2, http://www.law.georgetown.edu/solomon/documents/FAIRamicusColumbia.pdf (accessed August 10, 2007)

[385] Ibid., 2.

[386] Ibid., 4.

grants and contracts bear no relationship to that funding."[387] Amici asserted that they could not "simply reject federal funding without imperiling their very nature."[388]

Amici stated that "60% of university research expenditures" are a result of Federal assistance.[389] Amici emphasized the research performed at their universities "has yielded profound benefits to society, driving major portions of the national economy and supporting military preparedness."[390] Amici stated that they "support the military and recognize that a strong relationship between universities and the military is essential to the nation's security" however, the "government may not encumber the term of that relationship through unconstitutional restrictions on university research funding."[391] *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Speiser v. Randall*, 357 U.S. 513 (1958) were cited as precedents in protection against unconstitutional conditions.

Amici offered the results of a study by the National Science Board that concluded "Universities are the largest performer of basic research in the United States, accounting for more than half of the national total. National Science Board, Science and Engineering Indicators – 2004, at 5-8."[392] Amici contended that the partnership between the federal government and private research universities was "ubiquitous and indispensable."[393] Amici stated that federal funding to institutions of higher education "not only furthers the

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[387] Ibid

[388] Ibid., 2.

[389] Ibid., 3.

[390] Ibid

[391] Ibid., 5.

[392] Ibid., 11.

[393] Ibid., 13.

university's core educational mission, but also benefits society by ensuring a steady stream of highly trained graduates."[394]

Amicus 56 Columbia Law School Faculty Members

Amici were all "individual members of the faculty of the Law School at Columbia University."[395] Their brief centered on the interpretation of the text of the Solomon Amendment. They argued that the "evenhanded application of universally applicable recruitment policies" satisfied the requirements of the Solomon Amendment. [396] Their recruitment policies insured that the military gained access to student and campuses "for the purposes of military recruiting in a manner that is at least equal in quality and scope to the access... that is provided to any other employer."[397]

Under Amici's interpretation the Solomon Amendment "permits an institution to apply to military recruiters policies that are applied without exception to all other employers and with which all employers must comply to gain access for recruiting purposes."[398] Amici reasoned the Solomon Amendment did not require military recruiters to receive "favorable treatment" or "to be exempted from evenhanded application of institutional policies."[399]

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[394] Ibid., 15.

[395] Brief of *Amicus Curiae* 56 Columbia Law School Faculty Members, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusColumbiaFaculty.pdf (accessed August 10, 2007)

[396] Ibid., 4.

[397] Ibid., 3.

[398] Ibid., 9.

[399] Ibid., 7.

Amici stated that "only by adopting the equal treatment construction of the statute can this Court avoid the conclusion that the Solomon Amendment gives the military the authority to pick and choose which recruiting policies it will follow."[400] Amici contended "it would be extraordinary if the Solomon Amendment – almost alone among federal equality norms – requires equal outcomes rather than equal treatment."[401] They argued that the "only reasonable construction of the Solomon Amendment is one that permits the application of universally applicable nondiscrimination policies to military recruiters."[402]

Amici argued that the "Solomon Amendment requires equality in the sense of equal treatment, not in the sense of equal outcomes or actual access."[403] Applying Amici's interpretation of the Solomon Amendment would allow law schools and higher education institutions to bar military recruiters from their campuses under the universal application of their nondiscrimination policies. This brief and the argument presented were specifically addressed in the opinion of the Court written by Chief Justice Roberts.

Amicus William Alford, et al.

Amici were all "full time faculty members at the Harvard Law School."[404] The reason provided for submitting an Amicus Curiae brief in support of Respondents was "to vindicate Harvard Law School's right to apply its evenhanded antidiscrimination policy to all recruiters – including those from the United States military – in harmony with the

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[400] Ibid., 13.

[401] Ibid., 15.

[402] Ibid., 20.

[403] Ibid., 24.

[404] Brief of *Amicus Curiae* Professor William Alford, et al., 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusHarvard.pdf (accessed August 10, 2007)

numerous Federal, State, and local laws that outlaw various forms of discrimination by private actors."[405] They argued that the question before the Supreme Court of the United States was "whether the Solomon Amendment confers upon military recruiters the unprecedented entitlement to disregard neutral and generally applicable recruiting rules whenever a school's failure to make a special exception might incidentally hinder or preclude military recruiting."[406] Their interpretation was "the Solomon Amendment applies only to policies that single out military recruiters for special disfavored treatment, not evenhanded policies that incidentally affect the military."[407] Amici contended under this interpretation, the Harvard Law School was in "full compliance – and the same is likely true of the vast majority of United States law schools."[408]

Amici argued law school nondiscrimination policies do not "single out military recruiters for disfavored treatment: military recruiters are subject to exactly the same terms and conditions of access as every other employer."[409] Amici stated "the Solomon Amendment rules out policies that target military recruiters for disfavored treatment, but it does not touch evenhanded antidiscrimination rules that incidentally affect the military."[410] Amici contended "there is nothing remotely "anti-military"...about insisting that military recruiters follow the same evenhanded rules as everyone else."[411]

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[405] Ibid

[406] Ibid., 2.

[407] Ibid., 10.

[408] Ibid., 1.

[409] Ibid., 2.

[410] Ibid., 3.

[411] Ibid., 16.

Amici expressed concern with the ruling from the Third Circuit Court of Appeals that the Solomon Amendment "infringes upon associational rights, compels unwilling speech, and restricts expressive conduct."[412] Amici reasoned that such a ruling could "encourage attempts by discriminatory employers, educational institutions, or other groups to evade compliance with various pieces of Federal Civil Rights legislation – including the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 – by asserting that granting equal treatment without regard to race or sex would send a "message" with which they disagree."[413]

Amici suggested the Supreme Court of the United States "should hold that the Solomon Amendment is simply a measure that bars policies or rules that target the military for disfavored treatment."[414] This brief and the argument presented were specifically addressed in the opinion of the Court written by Chief Justice Roberts.

Amicus National Association for Law Placement (NALP), Syracuse University, and Individual Law School Professors and Administrators

Amici were "a membership organization dedicated to facilitating legal career counseling and planning, recruitment, and retention, and to the professional development of law students and lawyers."[415] Amici's identified interest was to ensure "that the Court is fully informed as to the nature of the recruiting and placement process."[416] Their brief

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[412] Ibid., 21.

[413] Ibid

[414] Ibid., 23.

[415] Brief of *Amicus Curiae* The National Association for Law Placement, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusNALP.pdf (accessed August 12, 2007)

[416] Ibid

centered on the "many sorts of things that law school career services offices do to assist employers in the recruiting process."[417] Amici stated "law school career services offices are integrally involved in speech – in facilitating, disseminating, and providing a forum for the speech of recruiting employers and students, and in speech of their own as well."[418] Amici contended because law school career services professionals were "actively involved in disseminating and even helping to craft the expressive speech of the military recruiters" their speech was compelled and their associational rights were being infringed.[419]

Law school career services professionals arrange "one-on-one" interviews, provide "teleconferencing or videoconferencing services", offer "lodging at the school's own expense for recruiters who travel from other cities."[420] Amici stated law school career services professionals coordinate "gatherings on campus at which students and employers' representatives can meet in a cordial, low-pressure, event that is more like a cocktail reception than an interview or meeting."[421] Amici stated "career services professionals and the schools they serve use the school's time, energy, facilities and resources to disseminate recruiters' speech, and to create situations in which recruiters can speak directly to students one-on-one or in larger groups."[422] *Wooley* and *Hurley* were

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[417] Ibid., 4.

[418] Ibid., 5.

[419] Ibid., 7.

[420] Ibid., 10.

[421] Ibid., 12.

[422] Ibid., 14.

cited as precedents in addressing the 'Compelled Speech' and 'Expressive Association' claims.[423]

Amicus the National Lesbian and Gay Law Association, Law Student Associations, State Bar Associations, and the National Gay and Lesbian Task Force

Amici were "law student associations, national and State bar associations and advocacy groups."[424] Their advanced interest in Amici was to "eliminat[e] discrimination on the basis of sexual orientation at law schools, in the legal profession, and in society at large."[425] Amici asserted that due to law schools nondiscrimination policies "virtually every law school in the country refuses to assist any employer that discriminates on the basis of sexual orientation."[426] Amici identified three expressive functions served by law school's nondiscrimination policies. "First, teaching the values that these law schools believe are essential to the improvement of the legal profession and society; Second, creating an environment on law school campuses where all students feel equally welcome and able to participate in a meaningful way in the intellectual, social, and cultural life of the school; Third, taking a stand in the vigorous national debate on one of the most pressing social issues of the day by rising up in support of and providing an example of equal opportunity regardless of sexual orientation."[427]

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[423] Ibid., 5.

[424] Brief of *Amicus Curiae* The National Lesbian and Gay Law Association, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusNLGLA.pdf (accessed August 12, 2007)

[425] Ibid

[426] Ibid., 2.

[427] Ibid., 3.

Amici stated "the law schools' attempt to express their message through the even-handed enforcement of their nondiscrimination policies against the military illustrates the importance of the First Amendment right of association and the protections it provides against attempts by the Government to compel conformity with its values."[428] Amici asserted it was the "considered judgment" of law schools to "inculcate in their students the principle of nondiscrimination; to maintain an environment in which all students feel that they have equal opportunities to learn, prepare for, and join the legal profession; and to make their voices heard in the broader movement against discrimination in the legal profession and in society at large."[429]

Amici contended the Solomon Amendment infringed on the law schools associational freedoms "by enabling the military to insert itself directly into the lives of the law schools, directing the schools' recruiting activities in a critical respect, and requiring the schools to affirmatively assist the military in promoting its discriminatory message."[430]

Amici asserted "an association must remain free to express its message of protest in the manner it chooses and, accordingly, is not limited to public pronouncements if the association feels that those pronouncements will not effectively convey its message."[431] Amici claimed they "have a First Amendment right to enforce their nondiscrimination policies even-handedly and free of Government interference that prevents them from expressing their message to students, employers, and the public in an effective and

[428] Ibid., 3.

[429] Ibid., 4.

[430] Ibid., 6.

[431] Ibid., 15.

meaningful way."[432] Amici cited *Dale*, *Hurley* and *NAACP v. Claiborne* as precedents in supporting their arguments.

Amicus Servicemembers Legal Defense Network (SLDN)

The Servicemembers Legal Defense Network is "a national, not-for-profit legal services and policy organization dedicated to protecting the rights of military personnel affected by the military's "Don't Ask, Don't Tell" policy."[433] The SLDN works "to ensure that all Americans have the freedom to serve."[434] Their brief argued that the government's reliance on military deference should be rejected by the Court because "the concept of judicial deference in military affairs has no application where –as here - Congress is regulating the conduct of non-military personnel in non-military space. Second, deference is not warranted here because the Solomon Amendment concerns recruiting on law school and university campuses – a matter with regard to which the military has no unique expertise and about which the judiciary is perfectly well equipped to make judgments. And third, in enacting the Solomon amendment, Congress conducted no factual investigation and made no studied choice between alternatives, and thus there is no empirical judgment to which the judiciary can defer."[435]

Amici asserted the Solomon Amendment "does not concern a specific regulation within military society; it concerns how civilian institutions must behave when the

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[432] Ibid., 29.

[433] Brief of *Amicus Curiae* Servicemembers Legal Defense Network, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusServicemembers.pdf (accessed August 12, 2007)

[434] Ibid

[435] Ibid., 5.

military reaches into civilian society."[436] Amici argued the Solomon Amendment "forces civilian institutions to speak for the armed forces, to associate with them, and to assist in their discriminatory practices."[437] Amici contended that the actions taken by Congress in enacting the Solomon Amendment burdened the "Constitutional rights" of citizens in a "civilian society" and therefore judicial deference to the military and military affairs afforded by the Court did not apply.[438]

Amici claimed recruiting at law schools and institutions of higher education "does not fall within the military's unique expertise..."[439] Amici contended "the Government is demanding that this Court defer to the judgments of Congress and the military with respect to matters that fall well outside the scope of the military's unique expertise and that do not concern matters of military strategy and operations ..."[440]

Amici stated "there is no reason to believe that Congress considered any less restrictive alternatives to these enactments and concluded that those alternatives would be insufficient."[441] Amici asserted the enactment of the Solomon Amendment in 1994 consisted of "generalized assertions regarding the importance of recruiting."[442] Amici claimed there were "no supporting findings or evidence, such as statistics or surveys,

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[436] Ibid., 10.

[437] Ibid

[438] Ibid., 12.

[439] Ibid., 15.

[440] Ibid., 16.

[441] Ibid., 17.

[442] Ibid., 18.

showing a real need for the Solomon Amendment."[443] Amici asserted the Solomon Amendment "was a result of rhetoric, rather than real military need."[444]

Amicus Student/Faculty Alliance for Military Equality (SAME) and OutLaws

SAME is a "student organization at Yale Law School formed in response to the school's forced waiver of its nondiscrimination policy for military recruiters."[445] SAME "creates a social forum for LGBT students and educates members of the Yale Law School community and others about issues affecting LGBT persons."[446] Their brief asserted that the schools nondiscrimination policies "protects members of SAME and OutLaws from the type of discrimination that many have faced in other contexts."[447] Amici argued that members of SAME and OutLaws chose Yale Law School in "great part because of the high value it placed on promoting nondiscrimination on the basis of sexual orientation."[448] They reasoned that the military was seeking and requiring "special treatment because it expects to be treated better than other employers who fail to sign the nondiscrimination statement."[449] Amici stated "the military is simply prohibited from participating in the school's official recruiting program because its presence with nondiscriminatory employers violates the nondiscrimination policy."[450]

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[443] Ibid

[444] Ibid., 28.

[445] Brief of *Amicus Curiae* Student/Faculty Alliance for Military Equality, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusSame.pdf (accessed August 12, 2007)

[446] Ibid., 2.

[447] Ibid., 8.

[448] Ibid

[449] Ibid., 13.

[450] Ibid., 8.

Amici argued that their "expressive association rights" were being impaired by the application of the Solomon Amendment and also that Yale Law School should have the "ability to voice its opinion on nondiscrimination, regardless of that message's acceptance in society at large."[451] Amici contended the Yale Law School community was "an expressive association because the school is a highly selective institution with an educational purpose, one supported and defined by its nondiscrimination policy."[452] Amici cited *Dale* and *Claiborne* as precedent in supporting their arguments.

Respondents *Amicus Curiae* Briefs Summary

The Respondents *Amicus Curiae* Briefs centered on law schools rights to enforce their nondiscrimination policies. Amici argued their recruitment and nondiscrimination policies were part of the academic freedom of institutions of higher education that has long been protected by the Supreme Court of the United States due to the institutions' unique environment, atmosphere and customs. Amici claimed the nondiscrimination policies were tools of academic freedom used to provide an environment that law schools determined was required to inculcate their members with the lessons and culture of the organization. Amici contended the Solomon Amendment compelled the speech of law schools, infringed on the law schools expressive and associational rights protected under the First Amendment and constituted an unconstitutional condition on the receipt of Federal funds. Amici cited Supreme Court decisions in *Dale*, *Hurley*, *Wooley*, and *Rust*, as applicable precedents in supporting their arguments.

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[451] Ibid., 19.

[452] Ibid., 16.

The brief of the Cato Institute argued for the rights of law schools as "private institutions."[453] Amici asserted it was "no business of the Court, or the state, to tell private law schools what their message should be, ...[and] how to best convey their message."[454] Under this interpretation law schools can be viewed as separate from the parent organization, other subelements of the higher education institution and potentially from the State in which the institution resides. This myopic and isolated view of law schools does not promote an understanding that law schools are a part of the parent organization. Law schools should not be viewed as "private institutions" but a part of the larger parent organization.

The brief submitted by Columbia University, Cornell University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University identified a symbiotic relationship between the Federal Government and institutions of higher education. Amici asserted that institutions of higher education could not "simply reject federal funding without imperiling their very nature."[455] Amici understood that their "nature" was reliant in part to Federal funding provided by the Government. Both entities rely on each other for support and progress. The Federal Government provides funding and regulations and the higher education institution provides trained personnel and research to support the Government. Amici were all private institutions that reasoned their nature would be imperiled without Federal

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[453] Brief of *Amicus Curiae* The Cato Institute, 1, http://www.law.georgetown.edu/solomon/documents/FAIRamicusCato.pdf (accessed August 10, 2007)

[454] Ibid., 2.

[455] Brief of *Amicus Curiae* Columbia University, Cornell University, Harvard University, New York University, The University of Chicago, The University of Pennsylvania, and Yale University, 2, http://www.law.georgetown.edu/solomon/documents/FAIRamicusColumbia.pdf (accessed August 10, 2007)

funding. This suggests a symbiotic relationship between institutions of higher education and the Federal Government.

The Servicemembers Legal Defense Network (SLDN) provided an interesting interpretation of the Solomon Amendment and the judicial deference the Court has provided in its rulings concerning the military and military affairs. Under Amici's interpretation the Solomon Amendment reached into "civilian society" and therefore should not be provided judicial deference the Court provides the military when addressing military affairs.[456] Amici contended the Solomon Amendment did not concern military strategy or addressed military society.[457] Under this interpretation the Solomon Amendment was unconstitutional because it was attempting to regulate how "civilians" operated in a "civilian society."[458]

The briefs submitted by the Association of American Law Schools (AALS), and the National Association for Law Placement provided a factual basis for understanding AALS member law schools requirements and the recruitment services provided by law school career services personnel. The brief submitted by Robert Burt provided a detailed account of the 20-year relationship between military recruiters and Yale Law School. These briefs would serve as vital assets to higher education administrators in understanding the issues surrounding this litigation.

The briefs submitted by 56 Columbia Law School Faculty and William Alford, et al. provided an interpretation of the Solomon Amendment requirements that would have

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[456] Brief of *Amicus Curiae* Servicemembers Legal Defense Network, 5, http://www.law.georgetown.edu/solomon/documents/FAIRamicusServicemembers.pdf (accessed August 12, 2007)

[457] Ibid., 10.

[458] Ibid

allowed law schools and institutions of higher education to continue preventing military recruiters' access to their campuses. These two briefs and their interpretations of the Solomon Amendment requirements were identified and discussed in the opinion delivered by the Court. Under Amici's interpretation, the legislative actions of Congress in enacting the Solomon Amendment would not have resulted in any greater access to college and university campuses than before its enactment. Law schools would still have the authority to prevent military recruiters from campus due to the military's current employment practices regarding homosexuals.

Several of the Respondents *Amicus Curiae* briefs acknowledged the importance of military recruiting and the compelling interest of the government in supporting an all-voluntary military. The issue was the means chosen by the government in achieving this goal. Amici argued that law schools should have the right and be protected in expressing their message of nondiscrimination and not be forced to associate with a discriminatory employer. Amici contended that the law schools nondiscrimination policies were tools of academic freedom used to inculcate their members with the values and teachings of law schools and also to shape their educational environments. The Government could not and should not be allowed to coerce law schools and institutions of higher education into forfeiting their academic freedom and longstanding nondiscrimination policies.

Amicus Briefs Supporting Neither Party

Amicus Brief of Christian Legal Society

The Christian Legal Society ("CLS") "is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters

in nearly every state and many law schools."[459] The CLS was joined in Amicus by the Alliance Defense Fund ("ADF"), which is "a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties."[460] Amici contended the analysis of free speech and associational rights of law schools "changes considerably when its application to public law schools is considered."[461] Amici stated it was "profoundly antithetical to the traditional understanding of the First Amendment's purpose" to grant public law schools the "right to instill their approved viewpoint in their student, and to do so by excluding those holding contrary perspectives."[462] Amici argued this request of the Court to "entitle" public law schools to exclude those that have a differing view did not support the view of public institutions of higher education as a "marketplace of ideas."[463] Amici asserted public institutions of higher education were "claiming a free speech right to exclude speakers whose messages and practices they find disagreeable."[464] The CLS argued that it was a "great irony" that public institutions and law schools would seek the right to "protect the purity of their perspective on homosexuality by excluding military recruiters."[465]

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[459] Brief of *Amicus Curiae* Christian Legal Society and Alliance Defense Fund, http://www.law.georgetown.edu/solomon/documents/amicusCLSneither.pdf (accessed August 18, 2007)

[460] Ibid

[461] Ibid., 2.

[462] Ibid., 6.

[463] Ibid., 2, quoting Keyishian v. Board of Regents, 385 U.S. 589 1967, 605-606 http://supreme.justia.com/us/385/589/ (accessed May 28, 2007)

[464] Ibid., 6.

[465] Ibid., 10.

Amicus Brief of Pacific Legal Foundation

Pacific Legal Foundation is a "nonprofit public interest law foundation" whose interest in Amicus was the "interpretation and application of a landmark First Amendment ruling, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)"[466] Their brief was filed because they did not want any "withdrawal or limitation of *Dale*."[467] Pacific Legal Foundation provided interpretations of *Dale* that could be used to either "strike down" the Solomon Amendment or "rule against the law schools."[468]

To "strike down" the Solomon Amendment the decision in *Dale* could be used if law schools were considered "private expressive organizations (like the Boy Scouts)" and the Solomon Amendment "subverted" the "tenets" of their organization.[469] The Court would also have to rule that the expressive associational rights of FAIR "supersedes" any "compelling governmental interest."[470] Amici provided that *Dale* could also be used to rule against the law schools if the Court ruled that the Solomon Amendment "furthers a compelling interest in a narrowly tailored way."[471] Amici suggested that the decision in *Dale* was "one of the key civil rights decisions of the last 100 years..."[472] Amici stated it

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[466] Brief of *Amicus Curiae* Pacific Legal Foundation, http://www.law.georgetown.edu/solomon/documents/amicusPLFneither.pdf (accessed August 19, 2007)

[467] Ibid

[468] Ibid

[469] Ibid., 2.

[470] Ibid

[471] Ibid

[472] Ibid., 2.

wanted the Supreme Court of the United States to issue its ruling on the case "without altering *Dale*"[473]

Amicus Curiae Briefs Supporting Neither Party Summary

The CLS claimed it was in support of neither party, however it provided substantial arguments to support the Petitioners in this case. The brief identified potential problems in ruling for the respondents and argued that free speech and associational rights differ between private and public institutions of higher education.

The brief submitted by the Pacific Legal Foundation provided an interpretation of the decision in *Dale* that could support either party in this litigation. This brief was in support of neither party and provided the issues at stake in this litigation. Both the Plaintiffs and Respondents in *Donald H. Rumsfeld, Secretary of Defense, et al., v. Forum for Academic and Institutional Rights, Inc., et al.* reasoned the ruling in *Dale* as supportive of their arguments in this case.

Selected Legal Cases

The parties focused on the selected legal cases listed below as precedents supporting their positions. The principle of following prior case law is known as "Stare Decisis" which means "to stand by that which is decided."[474] The principle is defined as the "rule by which common law courts are reluctant to interfere with principles announced in former decisions and therefore rely upon judicial precedent as a compelling guide to decision of cases raising issues similar to those in previous cases."[475] Judge Benjamin Cardozo reasoned that "Stare Decisis" was the "first" thing a judge does when

[473] Ibid., 5.

[474] Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (St. Paul, Minnesota: West Group, 2004)

[475] Ibid

deciding a case.[476] Cardozo stated "adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."[477]

Cases identified by both parties are identified in chronological order followed by the Petitioners cases and the Respondents cases. The case outline provides the following information:[478]

- Citation
- Facts/Summary
- Holding
- Reasoning
- Disposition
- Relevance

Both Parties Selected Legal Cases

Citation:

RUST ET AL. v. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, 500 U.S. 173 (1991)[479]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 89-1391.

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[476] Benjamin N. Cardozo, *The Nature of the Judicial Process: The Storrs Lectures Delivered At Yale University* (New Haven and London: Yale University Press, 1921), 19.

[477] Cardozo, *The Nature of the Judicial Process: The Storrs Lectures Delivered At Yale University*, 34.

[478] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis*, 2nd ed. (Madison: Legal Education Publishing, 1986), 92.

[479] Rust v. Sullivan, http://supreme.justia.com/us/500/173/case.html (accessed May 24, 2007)

Argued October 30, 1990

Decided May 23, 1991

Facts/Summary:

Congress enacted Title X of the Public Health Service Act in 1970, which provided Federal funding for family planning services. Section 1008 of the Public Health Service Act specified that none of the Federal funds appropriated under the Act's Title X for family-planning services could be used for abortion services as a method of family planning. In 1988, new regulations prevented doctors that worked on Title X projects from counseling, referring, or advocating aborting as a method of family planning. The new regulations also required the use of separate facilities, personnel and accounting records for projects related to abortion activities. Prior to the application of the 1988 regulations Title X grantees and doctors sued in District Court claiming a First Amendment violation of their 'Free Speech' rights because the government had placed viewpoint discriminatory conditions on Federal funds. The District Court and the Court of Appeals for the Second Circuit ruled in favor of the Secretary of Health and Human Services and ruled the regulations were permissible based on the intent and construction of Title X.[480]

Holding:

The regulations were a permissible construction of Title X.[481]

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[480] Ibid

[481] Ibid., 183.

Reasoning:

Chief Justice Rehnquist writing for the majority reasoned the legislative history of the statute identified Congress's intent that Title X funds could not be used for abortion related services. The additional regulations in Section 1008 did not conflict with Congress's intent of the statute and the Secretary of Health and Human Services was provided deference in administering the statute. The regulations did not violate the 'Free Speech' rights of Title X grantees and doctors by imposing viewpoint-discriminatory conditions on federal funds. The Government is entitled to proscribe conditions on the receipt of federal funds and make choices on what activities it funds in support of its interests. The government made a choice to fund family planning services but not abortion related services as a method of family planning.[482]

Disposition:

The Supreme Court of the United States affirmed the ruling of the Court of Appeals for the Second Circuit.

Relevance:

Petitioners argued the decision in Rust supported their argument that the Solomon Amendment funding conditions were permissible. Congress was conditioning funding to law schools and institutions of higher education on the access provided military recruiters. The funding conditions were not viewpoint discriminatory because Congress had a right to choose what activities it wanted to support. In the Rumsfeld case, Congress made a choice to condition Federal funding to law schools and institutions of higher education based on the access provided military recruiters.

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[482] Ibid., 192-200.

Respondents argued the decision in Rust supported their argument because conditions on Federal funding should relate to a specific program of the Government. Respondents contended the Solomon Amendment related to military recruiting of lawyers however, the funding conditions affected medical and scientific research not law schools. Therefore, the conditions on Federal funding associated with the Solomon Amendment did not relate to the program or interest the Government was attempting to achieve.

Citation:

HURLEY ET AL. v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, INC., ET AL. 515 U.S. 557 (1995)[483]

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 94-749.

Argued April 25, 1995

Decided June 19, 1995

Facts/Summary:

The South Boston Allied War Veterans Council was authorized by the city of Boston to organize and conduct the 1992 St. Patrick's Day-Evacuation Day Parade. The Irish-American Gay, Lesbian and Bisexual group of Boston (GLIB), submitted an application to march in the 1992 St. Patrick's Day – Evacuation Day Parade to express pride in their Irish heritage and as openly gay, lesbian, and bisexual persons. The South Boston Allied War Veterans Council denied GLIB's application and GLIB obtained a State-court order to march in the parade. In 1993, GLIB applied to march in the parade and the South Boston Allied War Veterans Council denied their application. GLIB

[483] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., http://supreme.justia.com/us/515/557/case.html (accessed May 24, 2007)

brought suit against the South Boston Allied War Veterans Council, the city of Boston and John Hurley alleging the denial to march in the parade violated the State public accommodations law and the State and Federal Constitutions. The State public accommodation law prohibited discrimination on the basis of sexual orientation in places of public accommodation. The State trial court ruled that the parade fell within the statutory definition of a public accommodation. The State trial court also rejected the South Boston Allied War Veterans Council contention that the parade was private and the selection of the units participating in the parade represented an expressive association decision of the South Boston Allied War Veterans Council. The State trial court concluded that the parade was an open recreational event and not an exercise of expressive association by the South Boston Allied War Veterans Council. The court ruled that the rejection of GLIB's application was in violation of the public accommodations law that prohibited discrimination on the basis of sexual orientation in places of public accommodation. The Supreme Judicial Court of Massachusetts affirmed the decision of the State court and agreed that the parade was a public accommodation.[484]

Holding:

Requiring private citizens who organize a parade to include a unit whose message the organizers do not want to convey violates the expressive associational rights of the parade organizers.[485]

Reasoning:

Justice Souter writing for a unanimous Court reasoned parades were a form of expression and every unit participating in the parade affected the message conveyed by

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[484] Ibid

[485] Ibid., 566-581.

the organizers. The State public accommodations statute forced the parade organizers to alter their message and the content of their parade. The parade organizers had the right to choose the content of their message.

Disposition:

The Supreme Court of the United States reversed the judgment of the Massachusetts Supreme Judicial Court and remanded the case for further proceedings.

Relevance:

Petitioners argued the decision in *Hurley* did not apply to the Solomon Amendment case because military recruiters were not requesting permission to be a part of the law schools expressive association. Military recruiters like other employment recruiters were visitors to the law schools and institutions of higher education campuses for the sole purpose of recruiting qualified personnel. Petitioners also contended that recruiting forums were not an expressive activity on the part of the law schools, but and economic activity.

Respondents argued that law schools were expressive associations and was choosing the content of their message that discrimination on the basis of sexual orientation was wrong and denied access to all employers who discriminated. Respondents contended the selection of employment recruiters to participate in their recruiting forums was similar to the selection of parade units to participate in the expressive parade in *Hurley*. Because law schools were expressive organization and wanted to convey the message that discrimination was wrong, it chose to exclude the military because the inclusion of the military's message would alter the content of the law schools message.

Citation:

BOY SCOUTS OF AMERICA et al. v. DALE 530 U.S. 640 (2000)[486]

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 99-699.

Argued April 26, 2000

Decided June 28, 2000

Facts/Summary:

James Dale achieved and was approved as an assistant scoutmaster with the Boy Scouts of America. While attending college at Rutgers University, James Dale acknowledged to others that he was gay and joined the Rutgers University Lesbian/Gay Alliance. James Dale was appointed co-president of the Rutgers Lesbian/Gay Alliance. In his position with the Rutgers University Lesbian/Gay Alliance his photograph was published in a newspaper identifying him as the co-president of the Rutgers University Lesbian/Gay Alliance. Following the publishing of his photograph in the newspaper, James Dale received a letter from the Boy Scouts of America revoking his adult membership in the Boy Scouts. Dale requested a reason for his dismissal and was informed in a letter that the Boy Scouts did not allow membership to homosexuals. Dale filed a complaint against the Boy Scouts alleging the Boy Scouts violated the New Jersey's public accommodations statute by revoking his membership based on his sexual orientation. The New Jersey public accommodation statute prohibited discrimination on the basis of sexual orientation in places of public accommodation. The New Jersey Superior Court Chancery Division granted summary judgment for the Boy Scouts. The

[486] Boy Scouts of America et al. v. Dale, http://supreme.justia.com/us/530/640/case.html (accessed May 17, 2007)

court held the New Jersey's public accommodations law was not applicable because the Boy Scouts of America was not a public accommodation, but a private group. The court concluded that the Boy Scouts' position with respect to membership of homosexuals was clear. The court held that the First Amendment 'Freedom of Expressive Association' prevented the Government from forcing the Boy Scouts to accept Dale as a member or as a leader. The New Jersey Superior Court's Appellate Division reversed and remanded the decision of the New Jersey Superior Court Chancery Division. The Appellate Court held that the public accommodation statute applied to the Boy Scouts. The New Jersey Supreme Court affirmed the judgment of the Appellate Division and held that the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his homosexuality.[487]

Holding:

The Boy Scouts was a private, not-for-profit organization engaged in instilling its system of values to its members. The Boy Scouts asserted that homosexual conduct was inconsistent with the values embodied in their Scout Oath and Scout Law. Requiring the Boy Scouts to admit an openly homosexual person violated the 'Expressive Association' rights of the Boy Scouts. The Government could not force a private group to accept a member it did not desire.[488]

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[487] Ibid

[488] Ibid., 640-644.

Reasoning:

Chief Justice Rehnquist writing for a majority of the Court reasoned the Boy Scouts were protected by the First Amendment to send their approved message and to determine the membership of their private organization. The Boy Scouts as a private entity asserted that allowing an openly homosexual member would suggest that the Boy Scouts accepted homosexual conduct as a legitimate form of behavior. This message would be contrary to the nature and beliefs of the Boy Scouts that was exemplified in their Scout Oath and Scout Law. The forced inclusion of an unwanted member affected the message the Boy Scouts wanted to convey and affected their 'Expressive Association.'

Disposition:

The Supreme Court of the United States reversed the judgment of the New Jersey Supreme Court and remanded the case for further proceedings.

Relevance:

Petitioners contended the decision in *Dale* did not apply to the Solomon Amendment case because the military recruiters were not requesting membership to the law school organization. Unlike *Dale*, law schools were not being forced to accept military recruiters as members of their organization. Under the Solomon Amendment law schools were free to deny military recruiters access to campus, with the understanding that this denial would result in the loss of federal funds. Because of this choice, law schools were not required to associate with military recruiters or to accept the military recruiters' message as their own. Under the Solomon Amendment, law schools were free

to disassociate themselves from military recruiters and protest the practices and policies of the military.

Respondents contended the decision in *Dale* supported their argument that law schools were expressive associations who wanted to instill their members with its system of values consistent with the values embodied in its nondiscrimination policies. Respondents argued the inclusion of military recruiters, as discriminatory employers, was contrary to their expressed nature and beliefs exemplified in their nondiscrimination policies. This inclusion altered the message of law schools and suggested that the law schools accepted and supported discriminatory employers. By denying military recruiters access, the law schools were conveying the message that discrimination was against their nondiscrimination and recruitment policies. The law schools in denying access to military recruiters were instilling the values of nondiscrimination to its members.

Both Parties Selected Legal Cases Summary

Rust, *Hurley* and *Dale* were selected by both parties to support their arguments in the Rumsfeld case. *Rust* was selected by Petitioners to identify the scope and power of Congress to condition Federal funds. The Government reasoned that the Solomon Amendment was a constitutionally permissible exercise of Congress's 'Spending Authority.'

Respondents contended that *Rust* supported their argument because conditions on federal funding were required to relate to the specific program of the Government. Respondents reasoned that conditioning Federal funding allocated for scientific and medical research did not relate to the Solomon Amendment's stated purpose of recruiting military lawyers. Therefore, the Solomon Amendment was an unconstitutional condition

on the receipt of Federal funds because it did not relate to the specific purpose and program of the Government.

Both parties cited the decision in *Hurley* as supporting their arguments. Petitioners contended that recruiting forums organized by law schools and institutions of higher education were and economic activity. Petitioners reasoned the recruiting forums were organized for the sole purpose of finding employment for students. Petitioners asserted that Respondents were not coordinating and organizing recruitment forums as an expression of their 'Expressive Associational' rights as the parade organizers were in *Hurley*. Petitioners reasoned the decision in *Hurley* did not apply to the Rumsfeld case because military recruiters were not petitioning to become part of the law schools' expressive message. Military recruiters were visitors to law schools for the express purpose of participating in the economic activity of recruiting military lawyers.

Respondents selected *Hurley* to identify that they should have the right, as part of their expressive associational rights protected under the Constitution, to select the participants in their forums. Respondents contended the selection of employment recruiters to participate in their recruiting forums was analogous to the selection of parade units to participate in the parade identified in *Hurley*. The ruling in *Hurley* upheld the parade organizers right to select the units it wanted in the parade and to deny those units that did not convey the message of the organizers. Respondents wanted to convey the message that discrimination was wrong and assisting those who discriminate was wrong, therefore denying military recruiters access to law school recruiting forums was constitutionally protected because law schools were choosing to deny those units that did not best convey their message.

Dale was selected by Petitioners to emphasize that the decision in *Dale* did not apply to the Rumsfeld case. Petitioners contended that unlike *Dale*, military recruiters were not requesting membership to law schools. The inclusion of military recruiters did not affect the membership, leadership, or message of the law schools.

Respondents contended the decision in *Dale* supported their argument that as private institutions they were protected under the Constitution to select the best way to convey their message of nondiscrimination. Like the decision in *Dale*, Respondent argued the forced inclusion of a discriminatory employer altered their message of nondiscrimination and therefore infringed on their Constitutional rights. Like the Scout Oath and Scout Law, Respondents argued that their nondiscrimination policies were used to instill their members with the values that discrimination on the basis of sexual orientation was wrong. Therefore, forcing law schools to accept a discriminatory employer in the face of the nondiscrimination policies advanced by the law schools was unconstitutional.

Petitioners Selected Legal Cases

Citation:

SOUTH DAKOTA v. DOLE, SECRETARY OF TRANSPORTATION, 483 U.S. 203 (1987)[489]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-260.

Argued April 28, 1987

Decided June 23, 1987

[489]South Dakota v. Dole, http://supreme.justia.com/us/483/203/case.html (accessed May 28, 2007)

Facts/Summary:

The State of South Dakota had established its minimum legal drinking age at nineteen years of age. Congress enacted the National Minimum Drinking Age -23 U.S.C 158 in 1984 that directed the Secretary of Transportation to withhold five percent of federal highway funds from States that had an alcohol drinking age of less than twenty-one years of age. The State of South Dakota sued the Secretary of Transportation – Elizabeth Dole in United States District Court. South Dakota was seeking a declaratory judgment that 23 U.S.C 158 exceeded the constitutional limits on Congress' Spending Power under Art. I, § 8, cl. 1, of the Constitution and also violated the Twenty-first Amendment to the United States Constitution which granted power to the States to determine the distribution, importation and sale of liquor. The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed.[490]

Holding:

The National Minimum Drinking Age - 23 U.S.C. 158 was a valid exercise of the powers granted Congress under its spending authority. Congress may attach conditions on the receipt of federal funds to further its policy objectives. The Spending Clause power is not unlimited and must be in pursuit of the general welfare, must be unambiguous so that the States can make choices understanding the consequences of their participation, must be related to the federal program and that other constitutional provisions do not provide an independent bar to the conditional grant of federal funds.[491]

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[490] Ibid

[491] Ibid., 206-212.

Reasoning:

Chief Justice Rehnquist writing for the majority reasoned Congress found the differing drinking ages in the States created incentives for young people to combine their desire to drink with their ability to drive. This presented an interstate problem and Congress used its Spending Clause power to address this interstate problem. Establishing a minimum drinking age would benefit the general welfare by eliminating the incentive of young people to drive to another state where they met the States' age requirements for the purchase and consumption of alcohol. The funding conditions were clear and unambiguous, providing for safe interstate travel was related to federal funds for highway construction, and the funding conditions did not violate the State's constitutional rights that would provide a bar to the conditional grant of federal funds.

Disposition:

The Supreme Court of the United States affirmed the judgment of the Court of Appeals for the Eighth Circuit.

Relevance:

Petitioners contended this ruling from the Court supported their argument that the Solomon Amendment was a valid exercise of Congress' Spending Power under Art. I, § 8 of the United States Constitution. The Solomon Amendment met the four-part Spending Power limitations as identified in *Dole*. The Solomon Amendment was in pursuit of the general welfare, its conditions were unambiguous, the conditions related to the federal program, and there was no constitutional provisions that provided and independent bar.

Citation:

UNITED STATES ET AL. v. AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

539 U.S. 194[492]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 02-361.

Argued March 5, 2003

Decided June 23, 2003

Facts/Summary:

Public libraries that provided Internet access to patrons were having problems with children being exposed to pornographic material. Congress was concerned that the E-rate program, which provided discounted telecommunication services to public libraries, and grants provided under the Library Services and Technology Act (LSTA) may be supporting access to illegal and harmful pornography. In response to the concern that the E-rate program and LSTA grants may be supporting illegal or harmful pornography Congress passed The Children's Internet Protection Act (CIPA) which provided that a public library could not receive E-rate or LSTA assistance unless it installed Internet filtering software on its computers to protect minors from pornographic material. The American Library Association (ALA) sued the United States in District Court challenging the constitutionality of the Internet filtering requirements. The District Court ruled that CIPA was facially unconstitutional and enjoined the withholding of federal assistance from libraries that did not comply with the CIPA Internet filtering

[492] United States et al. v. American Library Association, Inc., et al., http://supreme.justia.com/us/539/194/case.html (accessed May 28, 2007)

requirements. The District Court held that Congress had exceeded its authority under the Spending Clause, and the Internet filtering software was a content-based restriction to a public forum. The District Court also ruled that the Government had a compelling interest in protecting minors from harmful and illegal pornographic material, however, the use of filtering software was not narrowly tailored to achieve these interests.[493]

Holding:

The ruling of the District Court was reversed.[494]

Reasoning:

Chief Justice Rehnquist writing for the majority reasoned CIPA did not induce libraries to violate the Constitution, and was a valid exercise of Congress' Spending Power. Congress has latitude in attaching conditions to the receipt of federal assistance to further its policy objectives. Internet access is not considered a public forum because the computers were not purchased and installed for the purpose of establishing a public forum. The computers were purchased and installed as a resource to library patrons to facilitate education, research and learning. The E-rate and LSTA programs were intended to help public libraries obtain material for educational and informational purposes. Congress has the right to insist that the E-rate and LSTA program funds be used for the purposes established by the Government.

Disposition:

The Supreme Court of the United States reversed the judgment of the District Court for the Eastern District of Pennsylvania.

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[493] Ibid

[494] Ibid., 194.

Relevance:

The decision in this case supports the Petitioners claims that the Solomon Amendment is a valid exercise of Congress' Spending Authority. The funding conditions in the *ALA* case are similar to the Solomon Amendment case. Congress used its spending leverage to encourage public libraries to accept the Internet filtering conditions. Public libraries were offered a choice to either comply with the filtering requirements or forfeit federal funding.

Petitioners Selected Legal Cases Summary

Petitioners selected legal cases centered on the rights of Congress to condition federal funding. Petitioners contended the rulings in *Dole* and *ALA* supported their argument that the Solomon Amendment was a legitimate use of Congress' Spending Authority. The Solomon Amendment met the four-part requirements identified in *Dole* for the constitutional conditioning of federal funds and also like *ALA* provided law schools and institutions of higher education with a choice to accept federal assistance and comply with the conditions of the funding or reject federal assistance and not be subject to compliance.

Respondents Selected Legal Cases

Citation:

PERRY v. SINDERMANN, 408 U.S. 593 (1972)[495]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70-36.

Argued January 18, 1972

[495] Perry v. Sindermann, http://supreme.justia.com/us/408/593/case.html (accessed June 2, 2007)

Decided June 29, 1972

Facts/Summary:

Robert Sindermann, was a professor and was elected president of the Texas Junior College Teachers Association. In this capacity, he became involved in public disagreements with the policies of the college's Board of Regents and was critical of the Regents. In May 1969, Sindermann's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release identifying allegations of Sindermann's insubordination. The Regents did not provide Sindermann with an official statement of the reasons for the nonrenewal of his contract. They also did not allow Sindermann an opportunity for a hearing to challenge the basis of the nonrenewal decision. Sindermann brought action in Federal District Court and alleged that the Regents' decision not to rehire him was based on his public criticism of college administration policies and therefore infringed his free speech rights and his procedural due process rights. The District Court granted summary judgment for Petitioners, concluding that Sindermann's contract had terminated and the junior college had not adopted a tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of Sindermann's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech. Sindermann also expected to be retained and the failure to allow him an opportunity for a hearing violated his procedural due process rights guaranteed under the Constitution.[496]

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[496] Ibid

Holding:

The District Court erred in determining the reasons for Sindermann's nonrenewal. If his nonrenewal was due to the exercise of Sindermann's right to free speech then it violated the Fourteenth Amendment of the Constitution. Pp. 596-598. Sindermann alleged the college had a de facto tenure policy, according to rules and understandings the college fostered and promoted, therefore he was entitled to a hearing to offer evidence for his continued employment and challenge those allegations that resulted in his termination.[497]

Reasoning:

Justice Stewart writing for the majority reasoned the Government may not deny a benefit to a person on a basis that infringed his constitutionally protected interests - especially, his interest in 'Freedom of Speech.' The Government cannot penalize a person's exercise of his constitutionally protected rights in its efforts to support its interests.

Disposition:

The Supreme Court of the United States Court affirmed the Court of Appeals decision.

Relevance:

Respondents contended the ruling in this case supported their argument that the Solomon Amendment penalized law schools for their exercise of 'Free Speech' protected by the Constitution. The law schools were critical of the military's employment practices and barred those employers that discriminated on the basis of sexual orientation from their campus. The Solomon Amendment was penalizing the law schools for their free

[497] Ibid., 599-603.

speech message that discrimination on the basis of sexual orientation was wrong. Thus the Solomon Amendment was unconstitutional because it penalized the law schools and the parent institution by denying federal funding due to the law schools exercise of its free speech.

Citation:

WOOLEY, CHIEF OF POLICE OF LEBANON, ET AL. v. MAYNARD ET UX. 430 U.S. 705 (1977)[498]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

No. 75-1453.

Argued November 29, 1976

Decided April 20, 1977

Facts/Summary:

New Hampshire statutes required that noncommercial motor vehicles bear license plates identifying the state motto, "Live Free or Die," and make it a misdemeanor to obscure the motto. George Maynard and his wife, who are followers of the Jehovah's Witnesses faith, viewed the motto as repugnant to their moral, religious, and political beliefs, and accordingly they covered up the motto on the license plates of their jointly owned family vehicles. Maynard was subsequently found guilty in state court of violating the misdemeanor statute on three separate charges and after refusing to pay the fines imposed, was sentenced to, and served, 15 days in jail. Maynard brought suit in Federal District Court seeking injunctive and declaratory relief against enforcement of the New

[498] Wooley v. Maynard, http://supreme.justia.com/us/430/705/case.html (accessed May 28, 2007)

Hampshire statutes; a three-judge court enjoined the State from arresting and prosecuting the Maynards in the future for covering the State motto on their license plates.[499]

Holding:

The threat of being prosecuted for covering their license plates in the future while using their personal vehicles for ordinary daily tasks justified injunctive relief.[500]

Reasoning:

Chief Justice Burger writing for the majority reasoned the State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. Forcing an individual to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable is in violation of the First Amendment. The States' claimed interests in requiring display of the state motto on license plates to facilitate the identification of passenger vehicles, and to promote appreciation of history, individualism, and State pride, were not sufficiently compelling to justify infringement of the Maynards First Amendment rights. The identification of passenger vehicles could be achieved by less drastic means, and the promotion of appreciation for the States' history, individualism and State pride cannot outweigh an individual's First Amendment right to avoid becoming the courier for the State's ideological message.

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[499] Ibid

[500] Ibid., 711-712.

Disposition:

The Supreme Court of the United States affirmed the Federal District Court decision.[501]

Relevance:

Respondents contended the Solomon Amendment forced the law schools to adopt the military recruiters' discriminatory message, and become an instrument of their ideological viewpoint that the law schools viewed as repugnant and against their moral and operational philosophy. The Solomon Amendment funding penalties were forcing the law schools to be instruments of the military's discriminatory message. The law schools were being forced to use their recruiting resources in a manner that was against their moral and operational philosophies. Under this reasoning the Solomon Amendment should be deemed unconstitutional

Citation:

ABOOD ET AL. v. DETROIT BOARD OF EDUCATION ET AL., 431 U.S. 209 (1977)[502]

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

No. 75-1153.

Argued November 9, 1976

Decided May 23, 1977

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[501] Ibid., 714.

[502] Abood et al. v. Detroit Board of Education et al., http://supreme.justia.com/us/431/209/case.html (accessed May 17, 2007)

Facts/Summary:

A Michigan statute authorized union representation of local government employees whereby every employee, regardless of whether they were union members, paid for union representation as a condition of their employment. Abood and other teachers filed action in Michigan State court against the Detroit Board of Education, the Union and Union officials. The teachers did not want to pay the union dues, opposed collective bargaining in the public sector, did not approve or wanted to be associated with the various political and other ideological activities engaged in by the Union. The teachers also wanted the agency-shop arrangement declared invalid under State law and the United States Constitution as a violation of their 'Freedom of Association' protected by the First and Fourteenth Amendments. The trial court dismissed the action and the Michigan Court of Appeals, upheld the constitutionality of agency-shop arrangement because Abood and other teachers did not notify the Union as to the causes to which they objected.[503]

Holding:

Under the First Amendment an individual should be free to believe as he will and that one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. Abood and the other teachers should not be required to contribute and support an ideological cause they opposed as a condition of employment. Employees should not be coerced into supporting ideological causes against their will or by threat of loss of governmental employment.[504]

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[503] Ibid

[504] Ibid., 232-237.

Reasoning:

Justice Stewart writing for the majority reasoned that the Respondents have a constitutional right to not associate or support political or ideological causes that they find objectionable – 'Freedom of Association.'

Disposition:

The Supreme Court of the United States vacated and remanded.

Relevance:

Respondents argued the Solomon Amendment forced law schools to support the ideological message of the military with their recruiting resources. The law schools found the ideological message and causes of the military objectionable and chose to not associate with the military. Respondents were choosing to advance their belief and message of nondiscrimination by the use of their nondiscrimination recruiting policies. Respondents contended that they were being threatened by the loss of federal funding to the parent institution to support the political and ideological causes of the military.

Respondents Selected Legal Cases Summary

Respondents contended the decisions in *Sindermann*, *Wooley,* and *Abood* supported their argument that the Solomon Amendment denied a benefit to law schools and institutions of higher education for the law schools exercise of its constitutionally protected rights of free speech and association. The Solomon Amendment penalized law schools for enforcing their nondiscrimination policies against military recruiters, and this violated the law schools freedom of speech and association protected under the Constitution. The Solomon Amendment also forced law schools to be an instrument of the Government by conveying an ideological message that they found repugnant and in opposition of their desired message of nondiscrimination. Respondents contended that

they should be free to select the content of their message without governmental influence and to associate with those entities that it identified would best convey their message of nondiscrimination. The Solomon Amendment requirements were in conflict with the rulings and precedents established in *Sindermann*, *Wooley,* and *Abood,* and, therefore, should be deemed unconstitutional.

Oral Argument

The Supreme Court of the United States granted *certiorari* in *Donald H. Rumsfeld, Secretary of Defense, et al., Petitioners v. Forum for Academic and Institutional Rights, Inc., et al.* on May 2, 2005.[505] The questions before the court were whether the court of appeals erred in holding that the Solomon Amendment violated the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.[506]

"Oral Arguments" are "legal arguments given in court proceedings by attorneys in order to persuade the court to decide a legal issue in favor of their client."[507] The Oral Argument is the "only publicly visible part of the Supreme Court's decision process."[508] The Oral Arguments of the Supreme Court of the United States take place "fourteen weeks out of each year."[509] The judges sit on the bench and hear Oral Arguments for four

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[505] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

[506] 04-1152 Rumsfeld, et al. v. Forum for Academic and Institutional Rights, et al., Questions Presented, http://www.supremecourtus.gov/qp/04-01152qp.pdf (accessed January 24, 2006)

[507] Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, Minnesota: West Group, 2004)

[508] William H. Rehnquist, "*How the Court Does Its Work: Oral Argument,*" in *Supreme Court: A New Edition of the Chief Justice's Classic History* (Westminster, MD, USA: Alfred A. Knopf Incorporated, 2001), 241.

[509] Ibid

cases from "ten o'clock in the morning until noon on Monday, Tuesday, and Wednesday."[510] The lawyer for each party is "provided one half hour to present his or her arguments before the court."[511]

This researcher petitioned the court to reserve a seat at the Oral Arguments. The researcher received notification from the Marshall of the Court, Pamela Talkin, on September 8, 2005 that one seat had been reserved for the researcher to attend the Oral Argument scheduled for Tuesday, December 6, 2005 at ten o'clock in the morning.[512] The researcher arrived at the Supreme Court of the United States building located on 1 First Street, NE, Washington, D.C. at approximately 8:50 A.M., and there were approximately 150 people outside waiting in line to attend the Oral Arguments. In front of the Court were camera crews and numerous protesters and picketers carrying signs that read, "God Hates the USA", "Don't Pray for the USA", "Thank God for Dead Soldiers" and "GodHatesfags.com." The researcher continued through the security protocols to gain access to the Court and was seated in the 2nd row on the right side of the Court.

Paul D. Clement, ESQ., Solicitor General (SG), Department of Justice represented the Petitioners and E. Joshua Rosenkranz, ESQ., New York, New York represented the Respondents.[513] Chief Justice Roberts began the session and SG Paul D. Clement opened by providing his interpretation of the Solomon Amendment and its requirements. He emphasized that the Solomon Amendment does not require a "predetermined level of

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[510] Ibid

[511] Ibid

[512] Appendix, original fax from Pamela Talkin/Marshall, Supreme Court of the United States

[513] Oral Argument Transcripts 04-1152, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf (accessed January 24, 2006)

access."[514] The Solomon Amendment required "what other employers receive."[515] Institutions of higher education were "free to criticize the military and its policies" and were "free to decline federal funds altogether."[516] Because higher education institutions were free to "criticize" the military's policies and to "decline" federal funding SG Clement stated that the "Solomon Amendment comports with both the Constitution and with common sense."[517]

Justice Scalia questioned the (level of access) statement, and asked if the military, as an employer who has a policy against the hiring of homosexuals was receiving "what other employers in the same situation would receive."[518] SG Clement responded by pointing out that the Solomon Amendment provided the military a right to gain access to campus and that the "military is not like any other employer for the purposes of its policy and its treatments of homosexuals."[519] The military is not like other employers because unlike any other employer the military's policies were a "result of a congressional mandate."[520]

Justice Breyer asked SG Clement if the constitutional question was "Does the Constitution ... permit a statute which says you have to give access to the military, when

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[514] Ibid., line 19, 3.

[515] Ibid., line 20, 3.

[516] Ibid., lines 21-23, 3.

[517] Ibid., lines 24-25, 3.

[518] Ibid., lines 6-7, 4.

[519] Ibid., lines 23-25, 4.

[520] Ibid., line 2, 5.

you wouldn't give access to any other employer?"[521] SG Clement stated that Justice Breyer was "exactly right."[522] Justice Scalia clarified the statement and stated that the Solomon Amendment did not just require the same access as all other employer for the purposes of recruiting, it required that "if you allow any other employer, you have to give it to the military in the same manner."[523]

Justice Breyer pointed out that one of the Respondents amicus briefs (56 Columbia Law School Faculty) interpreted the text of the Solomon Amendment to provide access to military recruiters following the policies applied to any other recruiters. This interpretation of the Solomon Amendment would avoid "a difficult constitutional question."[524] Amicus interpretation of the Solomon Amendment suggested that if an institution applied its policies regarding employment recruiting to every employer equally, then the institution would be adhering to the Solomon Amendment requirement of providing access to campus "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."[525] SG Clement pointed out that the Amicus interpretation of the Solomon Amendment "effectively accomplishes nothing" as it related to military recruiting.[526] He went on to explain that after access is gained then the "regulation of the manner of access" is what the Solomon Amendment addresses.

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[521] Ibid., lines 6-9, 6.

[522] Ibid., line 10, 6.

[523] Ibid., lines 19-20, 7.

[524] Ibid., line 12, 8.

[525] *Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, Public Law 108-375, U.S. *Statutes at Large* 118. 1811 (2004)

[526] Ibid., line 13, 9.

Justice Scalia questioned why the Solomon Amendment was not being defended "on the basis of the Spending Clause?"[527] Justice Scalia contended that the law was enacted to "raise and support armies."[528] SG Clement stated that he understood that the Solomon Amendment is "clearly supported" by the 'Spending Clause' and Article 1 Section 8 of the Constitution to raise and support armies.[529] SG Clement pointed out that the Solomon Amendment would be constitutional if it were a "direct imposition" based on Congress' congressional mandate to raise and support a military.[530]

Justice Souter asserted there was a "speech problem" because the Respondents would have to "underwrite" the speech of the military and this would force law schools to "change their own message."[531] SG Clement agreed with Justice Souter that "the military is being forced onto campus to make its own speech."[532] He contended that recruiting was a "traditional commercial enterprise" that did not fall within the First Amendment claims of the Respondents.[533] SG Clement explained that the reason for the Solomon Amendment was "to ensure that military recruiters, in fact, have an equal opportunity to recruit the same pool of individuals that all the other employers are trying to recruit."[534]

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[527] Ibid., line 23, 12.

[528] Ibid., line 1, 13.

[529] Ibid., line 3, 13.

[530] Ibid., line 10, 13.

[531] Ibid., lines 4-8, 16.

[532] Ibid., lines 15-16, 16.

[533] Ibid., line 8, 17.

[534] Ibid., lines 22-25, 18.

Justice O'Connor questioned if the "Solomon Amendment posed any restrictions on the extent to which the law schools can distance themselves from the military's views?"[535] SG Clement answered that there was "nothing in the Act that prevents the universities from disclaiming."[536] Justice Stevens followed up on Justice O'Connor's question and asked about the use of different facilities that were equal in function, as a message of expressing the law schools disapproval with the military's employment policies. SG Clement responded that the military would take the position that the use of different facilities would not be "equal in scope."[537] Justice Stevens then questioned if the lack of scope was because "of the message it sends or because it denies the opportunity to recruit as effectively?"[538] SG Clement responded that it was "the latter and only the latter."[539]

Justice Ginsburg questioned "what can the law school do, concretely, while the recruiter is in the room?"[540] SG Clement responded by stating that "they could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests."[541] He also stated that he would "draw the line, though, at saying that they have to go to the undergraduate campus..."[542] A requirement from law

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[535] Ibid., lines 6-8, 21.

[536] Ibid., lines 21-24, 21.

[537] Ibid., line 18, 22.

[538] Ibid., lines 20-22, 22.

[539] Ibid., lines 23-24, 22.

[540] Ibid., lines 8-10, 25.

[541] Ibid., lines 12-14, 25.

[542] Ibid., lines 14-16, 25.

schools that forced military recruiters to the undergraduate campus while other recruiters were at the law school campus would not meet the requirements of the Solomon Amendment for access equal in scope to other recruiters.

Justice Kennedy continued with the questioning regarding what the law schools could do and asked if they could "organize a student protest at the hiring interview rooms, so that everyone jeers when the applicant comes in the door ..."[543] SG Clement pointed-out that the school could organize a student protest and that would be "equal access" but that you would have to draw a "practical line" between "access and allowing the speech."[544] He then stated that the "Army recruiters are not worried about being confronted with speech, they're worried about actually not being allowed onto the same law schools."[545] SG Clement explained that the Solomon Amendment did not ask for a "right to be free of any discrimination, but a right to equal access."[546] He went on to say that "the recruiting office is not the heart of first-amendment activity on campus. And if the recruiting office acts in a way that ensures access, and the rest of the university engages in speech, that's a commonsense way to accommodate the interest of the military recruiters and the first amendment."[547] SG Clement then requested to reserve the rest of his time for rebuttal.

Atty. E. Joshua Rosenkranz opened his argument for the Respondents by asserting that Congress "really wants to squelch even the most symbolic elements of the law

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[543] Ibid., lines 18-20, 25.

[544] Ibid., lines 4-10, 26.

[545] Ibid., lines 17-20, 26.

[546] Ibid., lines 6-8, 28.

[547] Ibid., lines 13-19, 28.

schools' resistance to disseminating the military's message..."[548] Atty. Rosenkranz was interrupted by Chief Justice Roberts who stated that the case was about "...conduct, denying access to the military recruiters."[549] Atty. Rosenkranz continued and pointed-out that the case was about "refusal to disseminate the messages of the military recruiters."[550] Atty. Rosenkranz explained his argument asserting that Congress was "insisting" that the law schools disseminate the military recruiters' message and this was "viewpoint-oriented regulation of speech."[551] Chief Justice pointed-out that the Solomon Amendment "doesn't insist that you do anything. It says that, if you want our money, you have to let our recruiters on campus."[552]

Chief Justice Roberts raised the case of *South Dakota v. Dole* and stated that South Dakota had a "constitutional right, under the twenty-first amendment..." to establish its drinking age for alcohol consumption.[553] He continued by pointing out that the Supreme Court upheld the 'Spending Clause' conditions in that case and stated that if South Dakota "accepted Federal funds, they had to set their drinking age at 21."[554] Atty. Rosenkranz responded by identifying that *Dole* pointed out that if there was a

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[548] Ibid., lines 7-9, 29.

[549] Ibid., lines 17-18, 29.

[550] Ibid., lines 20-21, 29.

[551] Ibid., lines 8-12, 32.

[552] Ibid., lines 20-22, 32.

[553] Ibid., line 3, 33.

[554] Ibid., lines 6-7, 33.

"superceding constitutional right" at stake then "all bets are off."[555] Chief Justice Roberts pointed out that the there was a constitutional right to "raise a military."[556]

Justice Kennedy asked for clarification of the Respondent's argument and questioned if the argument was "solely for an expressive purpose."[557] Justice Souter stated that he thought the issue was that the university had created a forum for recruiting and that the speech of the law schools was being affected "...either by being mixed with something it doesn't want to say or by being, in effect, forced to support something it does not want to say."[558] Atty. Rosenkranz responded by explaining that the law schools message is "we do not abet those who discriminate. That is immoral."[559]

Justice Ginsburg questioned if the recruitment policies followed by the law schools were university-wide policy then would that restrict access to military recruiters to the entire university. Atty. Rosenkranz pointed-out that if the university had a policy then it would be able to enforce it. Justice Kennedy then raised the concern that the government would not be able to get "...medical schools for our Armed Forces" or "...schoolteachers who teach on military bases."[560] Atty. Rosenkranz responded by identifying that law schools have had their policies for several decades and Justice Breyer stated "that isn't relevant."[561]

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[555] Ibid., lines 10-11, 33.

[556] Ibid., line 15, 33.

[557] Ibid., line 10, 34.

[558] Ibid., lines 16-19, 35.

[559] Ibid., line 25, 35.

[560] Ibid., lines 18-20, 36.

[561] Ibid., line 10, 37.

Justice O'Connor stated it was the Government's position that the "law school is entirely free to convey its message to everyone who comes."[562] Atty. Rosenkranz asserted that "under the compelled-speech cases, the ability to protest the forced message is never a cure for compelled-speech violation."[563] Chief Justice Roberts pointed out "nobody thinks that the law school is speaking through those employers who come onto its campus for recruitment."[564] He went on to state "nobody thinks the law school believes everything that the employers are doing or saying."[565] Atty. Rosenkranz contended that the endorsement of a message is "not an element of [a] compelled-speech claim."[566]

Atty. Rosenkranz pointed out that that the message of the law schools was "we believe it is immoral to abet discrimination."[567] Adhering to the Solomon Amendment created a "double standard" when viewed by students. The students did not believe the message of the law schools because there were military recruiters at employment recruitment forums. Chief Justice Roberts stated that "the reason they don't believe you is because you're willing to take the money."[568] There was laughter in the Courthouse after this statement. The Chief Justice continued with his statement after the laughter subsided and stated "This is a message we believe in strongly, but we don't believe in it, to the

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[562] Ibid., lines 12-13, 37.

[563] Ibid., line s 21-23, 37.

[564] Ibid., lines 2-4, 38.

[565] Ibid., lines 5-7, 38.

[566] Ibid., lines 9-10, 38.

[567] Ibid., line 13, 38.

[568] Ibid., line 25, 38.

tune of $100 million"[569] Atty. Rosenkranz pointed-out that the Chief Justice was correct in his statement and stated that "the unconstitutional conditions doctrine says that you can't put a private speaker to that crisis of conscience."[570]

Justice Stevens asked hypothetically if during World War II if the military was trying to raise an army and compelled an unwilling university to provide recruitment facilities, would that violate the First Amendment of the universities? Atty. Rosenkranz responded that yes, it would violate the First Amendment of the universities "unless there was a compelling need."[571] Atty. Rosenkranz went on to explain that the First Amendment problem occurs when the university is forced to engage in communication that it does not want to participate in. The universities have a message that they want to disseminate and the forced inclusion of a government message that is not supported by a compelling need is a violation of the First Amendment rights of the university.

Justice Scalia wanted to know if "every time somebody gives as his reason for violating a law that he wants to send a message that he disagrees with that law that raises a First Amendment question?"[572] Atty. Rosenkranz responded "no" and continued by stating that "every time someone says that as a reason for refusing to host a message of an unwelcome messenger, that's a compelled-speech violation."[573]

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[569] Ibid., lines 4-6, 39.

[570] Ibid., line s 8-11, 39.

[571] Ibid., line 12, 40.

[572] Ibid., lines 20- 25, 41.

[573] Ibid., lines 1-6, 42.

Justice Breyer suggested that the "remedy" to the problem should not be "less speech, it is more speech."[574] Atty. Rosenkranz stated that "all bets are off when what the Government is doing is compelling the speech of a private actor, ..."[575] Justice Scalia then wanted an explanation of what parts of the Respondents argument was "compelled actual speech" and which was "compelled symbolic speech?"[576] Atty. Rosenkranz responded by providing the things that the universities were compelled to do under the Solomon Amendment. Atty. Rosenkranz stated that the universities were compelled to "sit down with the employers and help counsel them on what their students are interested in and how best to shape the message."[577] He continued and stated that the universities also have to "disseminate literature, post bulletins on bulletin boards, help the recruiter – or, excuse me, the law firm develop cocktail parties..."[578]

Justice Kennedy pointed out that the perspective employers were "proposing a commercial transaction" when they came to campus to recruit.[579] He felt that it would be a "simple matter" for the law schools to put on a "disclaimer" that identified that the law schools did not approve of the policies of the employers.[580] Atty. Rosenkranz responded that the Government could not "convert the career-services enterprise into a value-neutral

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[574] Ibid., lines 20-21, 45.

[575] Ibid., line 25, 45.

[576] Ibid., lines 16-17, 47.

[577] Ibid., lines 13-15, 48.

[578] Ibid., lines 18-20, 48.

[579] Ibid., line 9, 49.

[580] Ibid., lines 10-11, 49.

proposition."[581] He went on to explain that the law schools are "entitled to make their own judgments about what messages they will disseminate."[582] Justice Kennedy questioned Atty. Rosenkranz about law schools being allowed to make their own judgments about what message they will disseminate when it related to a commercial transaction. Atty. Rosenkranz responded stating "that is not what recruiters are doing."[583]

Justice Breyer questioned the interpretation of the statute by the Government that asserted the Solomon Amendment is violated when the law schools uniformly apply their nondiscrimination recruitment policy to military recruiters. Atty. Rosenkranz agreed and Justice Stevens asked again if Atty. Rosenkranz agreed and Atty. Rosenkranz responded affirmatively. This affirmative response supported the interpretation of the government and not the position of FAIR.

Justice Ginsburg questioned Atty. Rosenkranz about the possibility of university faculty, like the law school faculty, taking the position of choosing what causes they would assist and resist, would his argument support an action to totally bar military recruiters? Atty. Rosenkranz responded that he was not advancing that position before the Court. Justice Ginsburg continued with the line of questioning related to university faculty choosing what causes they would assist and resist and the possibility of university faculty choosing to totally bar military recruiters. Atty. Rosenkranz emphasized that he was not "pressing this point" and contended that the Solomon Amendment was a viewpoint discriminatory statute and that the Government had not produced evidence that

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[581] Ibid., lines 18-19, 49.

[582] Ibid., lines 17-18, 50.

[583] Ibid., line 24, 50.

they need to be on law schools campuses for the purposes of military recruiting.[584] Atty. Rosenkranz suggested other recruiting options such as notices in student publications and advertising that did not infringe on the law schools rights of speech and association.

Justice Stevens asked Atty. Rosenkranz if the message of the Government was "Join the Army" and Atty. Rosenkranz agreed. Atty. Rosenkranz continued and pointed out that the Government is only promoting this one message. Justice Souter interrupted and stated that he thought the single message of the Government was "Join the Army, but not if you're gay."[585] Atty. Rosenkranz agreed.

Justice Souter asked Atty. Rosenkranz "in your view is the compelling interest on the part of the Government recruitment or the refusal to accept gays?"[586] Atty. Rosenkranz responded that the compelling interest of the Government was the recruitment interest, and stated "We're not arguing that the Government has a compelling interest in excluding anyone."[587] Following this statement, Justice Souter stated that he thought FAIR's argument on compelling interest was that the Government asserted a discriminatory interest. Atty. Rosenkranz responded and stated "if the Government wants to assert a need, it has to identify the need."[588] Atty. Rosenkranz stated that the story of the Solomon Amendment was "the story of private institutions trying desperately to accommodate the Government's need, even in light of their own moral scruples."[589]

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[584] Ibid., line 3, 53.

[585] Ibid., lines 24-25, 54.

[586] Ibid., lines 6-8, 55

[587] Ibid., lines 11-12, 55.

[588] Ibid., lines 4-5, 56.

[589] Ibid., lines 10-13, 56.

Justice Breyer then pursued a line of questioning on speech and stated the Government is saying "let our recruiters in."[590] Atty. Rosenkranz responded and asserted that speech was on both sides of the argument, and law schools were being forced to host the Government's message. Atty. Rosenkranz stated that law schools are hearing "Join the Army, but not if you're gay." He asserted that the law schools had attempted to accommodate the Government "up until the point where Congress says, we don't actually want any of those things (referring to recruitment services) we want them only if you supply them to someone else."[591] Atty. Rosenkranz continued and stated "there's some reason in the law school's conscience, or the academic institution's conscience that it wants to treat this category of employers differently from any other."[592] At this point, Chief Justice Roberts interrupted and stated "you're perfectly free to do that if you don't take the money."[593]

Justice Scalia proposed a hypothetical situation that if law school faculty decided to not support a particular war, then would that be a basis for excluding military recruiters? Atty. Rosenkranz contended that it would be a basis for excluding military recruiters. Justice Scalia questioned if the university faculty decided it did not want to support a particular war would that become a basis for excluding military recruiters? Atty. Rosenkranz responded affirmatively. Justice Scalia reasoned that this action of the faculty would be an obstruction to the efforts of the military to raise and support a military by not allowing military recruiters on campus. Atty. Rosenkranz stated it was

[590] Ibid., lines 14-15, 56.

[591] Ibid., lines 8-11, 57.

[592] Ibid., lines 13-16, 57.

[593] Ibid., lines 17-18, 57.

"very important to distinguish obstruction from refusal to subsidize."[594] Justice Scalia interrupted and stated it was "obstruction when you refuse to give (military recruiters) what you give everyone else."[595] Atty. Rosenkranz stated "it is refusal to treat them the same as everyone else, because they are not the same as everyone else in the law schools' estimation."[596] Atty. Rosenkranz went on to emphasize that the Government had to identify why the military recruiting efforts required the "Yale law school personnel rather than Yale college personnel."[597] Justice Stevens interrupted and questioned if there were "occasional applications" of the Solomon Amendment statute that were invalid or did the Solomon Amendment in its entirety needed to be "struck down?"[598] Atty. Rosenkranz responded that the whole statute needed to be struck down because there was "no way to know exactly how Congress would rewrite the statute."[599] The time limit for Respondent's argument expired, and Chief Justice Roberts thanked Atty. Rosenkranz and provided SG Clement with his remaining four minutes.

With his remaining time for rebuttal SG Clement pointed out that the speech of the military recruiters was not "being misattributed to the schools."[600] He also stated that the Solomon Amendment was "a funding condition, not a compulsion."[601] SG Clement

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[594] Ibid., lines 8-9, 59.

[595] Ibid., lines 12-14, 59.

[596] Ibid., lines 15-18, 59.

[597] Ibid., lines 23-24, 59.

[598] Ibid., lines 4-6, 60.

[599] Ibid., lines 15-16, 60.

[600] Ibid., line 9, 61.

[601] Ibid., lines 6-7, 62.

also made the point that "there's simply no limit on Respondent's argument in this case."[602] Respondent's argument asserted that the Court should allow the law school faculty to decide what causes it wanted to support or resist. Following this argument SG Clement pointed out if "Don't Ask, Don't Tell" were changed, there may still be issues with the Government or other military matters that the law school faculty would resist and choose to protest those issues by denying military recruiters access to their campuses.

Oral Arguments Summary

This researcher observed the Oral Arguments and felt that the Justices agreed and understood the argument presented by SG Clement. SG Clement was direct and concise in answering the questions of the Justices. The Justices did not interrupt SG Clement during his oral argument as they did with Atty. Rosenkranz. SG Clement was able to complete his argument within the allotted time and save four minutes for rebuttal.

Atty. Rosenkranz presented the argument for FAIR and had a more difficult time with the Supreme Court Justices'. Atty. Rosenkranz was interrupted by Chief Justice Roberts during his opening statement while asserting his argument that this case was about speech. The Chief Justice interrupted and emphasized that the case was not about speech but about conduct. Atty. Rosenkranz could not complete his opening statement to frame his argument without being interrupted by the Chief Justice. This was in sharp contrast to the oral argument presented by SG Clement, where Chief Justice Roberts did not ask a question or make a statement.

Atty. Rosenkranz was quick to respond to the questions of the Justices, however the answers provided were indirect and the Justices repeatedly asked Atty. Rosenkranz to

[602] Ibid., lines 23-24, 63.

provide answers to their questions. Atty. Rosenkranz seemed flustered and made statements that supported the argument of the Government. When asked by Justice Breyer if the Solomon Amendment was violated if the law schools uniformly applied their nondiscrimination recruitment policy, Atty. Rosenkranz responded affirmatively. The reason identified by FAIR for the lawsuit was that law schools were not allowed to apply and enforce their nondiscrimination recruitment policies uniformly to the military. The military was a discriminatory employer who did not meet the nondiscrimination requirements of the law schools and therefore were denied access to law schools campuses. Stating that the Solomon Amendment was violated if law schools uniformly applied their nondiscrimination policies was an error on the part of Atty. Rosenkranz.

Attending the Oral Arguments was exciting and provided this researcher with a clearer understanding of the case and the points being argued by both the Respondents and Plaintiffs. It was valuable to be in the courtroom and experience the dynamics of the question and answer by the attorneys and the Supreme Court Justices, to see the expressions of the Justices, and the response of the audience. Attending the Oral Arguments provided insight in evaluating the decision offered by the Court and also provided a real life experience that increased the researchers understanding of the process of law.

Chapter II Summary

Chapter II presented the review of the literature, which included the legislative and litigation history of the Solomon Amendment in *Donald H. Rumsfeld, Secretary of Defense, et al., Petitioners v. Forum for Academic and Institutional Rights, Inc., et al.* Included was a summary of the Association of American Law Schools (AALS), "Don't Ask, Don't Tell" (DADT) Pub. L. 103-160 (10 U.S.C. § 654), the Forum for Academic

and Institutional Rights (FAIR). The District Court ruling, the Third Circuit Court of Appeals ruling, the twenty-seven Amicus Curiae briefs submitted, selected legal cases identified by the parties from the District Court proceedings, Third Circuit Court of Appeals proceedings and the opinion delivered by the Supreme Court of the United States. Also included was a summary and analysis of the Oral Arguments and the chapter summary.

CHAPTER III

METHODOLOGY

The purpose of this study was to analyze the Supreme Court Decision in *Donald H. Rumsfeld, Secretary of Defense, et al., v. Forum for Academic and Institutional Rights, Inc., et al.*

Legal Research methodology provided the foundation for the analysis. This is a qualitative study that used case study and historical legal research approaches. The researcher "is interested in understanding how participants make meaning of a situation or phenomenon, this meaning is mediated through the researcher as instrument, the strategy is inductive, and the outcome is descriptive."[603] The researcher collected data through document analysis and inductively analyzed the data.

The case study is "an intensive description and analysis of a phenomenon or social unit such as an individual, group, institution, or community." This approach "seeks to describe the phenomenon in depth."[604] A single case study can be "the basis for significant explanations and generalizations."[605] "The purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts".[606] In this study traditional methods of legal research will be employed. Relevant case history,

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[603] Merriam, *Qualitative research in practice: examples for discussion and analysis*, 6.

[604] Merriam, *Qualitative research in practice: examples for discussion and analysis*, 8.

[605] Yin, *Case Study Research: design and methods*, 4.

[606] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 29.

Constitutional Amendments, federal acts, state statutes, rules and regulations will be identified.

To implement the legal research, the researcher followed the legal research method offered in the text "*The Legal Research Manual: A Game Plan for Legal Research and Analysis*" by Christopher G. Wren and Jill Robinson Wren. The text provides steps to finding the law, reading the law and updating the law.[607] Finding the law consists of identifying primary sources of the law which consisted of the Solomon Amendment law codified in 10 USC 983.[608] The researcher performed a word search and known authority search in *LexisNexis*, *Findlaw*, *THOMAS, (Library of Congress)* and *Google* to ascertain the dates the amendment was offered on the floor and all of the statutes legislative amendments.[609] The researcher then analyzed the *Congressional Record* to gather the information offered in the floor debates and ascertained the voting record of the statute and each of its amendments in the United States House of Representatives and the United States Senate. The *Congressional Record* is the official record of the proceedings and debates of the United States Congress.[610]

The litigation history was completed by reading the opinions and documents filed before the District Court, Third Circuit Court of Appeals, and the Supreme Court of the United States. The researcher performed a word search of the Internet through the Google Search engine which resulted in finding the civil action brought by the Forum for

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[607] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis.

[608] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 41.

[609] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 45.

[610] The *Library* of *Congress* THOMAS, http://thomas.loc.gov/home/r110query.html (accessed May 21, 2007)

Academic and Institutional Rights (FAIR) in the United States District Court, District of New Jersey against defendants Donald H. Rumsfeld in his capacity as U.S. Secretary of Defense, et al.[611] The researcher analyzed all court documents including the Petitioners' complaint, the Governments' motion to dismiss, the arguments before the court and the decision of the District Court. The researcher analyzed all the court documents associated with the Third Circuit Court of Appeals action including the Notice of Appeal, Amicus Curiae briefs, and the decision of the Third Circuit.

The researcher analyzed all documents from the Supreme Court proceedings including the Petition for Writ of Certiorari, Plaintiffs' Brief on the Merits, Respondents Reply and Brief on the Merits, both parties Amicus Curiae briefs, the Oral Arguments, and the decision of the Supreme Court of the United States in *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR). The researcher also read and analyzed selected legal cases. The analysis utilized a Legal Brief format identifying the citation, case facts, holding, reasoning, disposition and relevance of the case to the Plaintiffs' and Respondents' arguments. The brief format was used to assist the reader in understanding the arguments that were presented by each party.

The researcher utilized Justia to search and retrieve the selected legal cases.[612] Justia "is a legal media and technology company focused on making legal information,

[611] SolomonResponse.org is a site developed and maintained by Georgetown University's Law School and provides a collection of documents related to the Solomon Amendment and related litigation.

[612] Justia.com, http://www.justia.com (accessed May 24, 2007)

resources and services easy to find on the Internet."[613] Justia was utilized due to its free accessibility to case law, codes, regulations and legal articles through the Internet.[614]

An "internal evaluation involves reading the particular legal authority you have found and determining whether, on its own terms, it applies to the fact situation in your research problem."[615] The "internal evaluation" was performed by reading selected legal authorities to determine if it applied to the research problem. Cases and statutes were evaluated to determine the implications on the parties' arguments and the Courts' decision. An "external evaluation" requires the researcher to "determine the current status (i.e., validity) of the authority."[616] The researcher conducted an external evaluation of the cases and statutes to determine their applicability to the Plaintiffs' and Respondents arguments. The researcher evaluated the cases identified and determined if the decision precedent supported or refuted the reasoning presented by the parties.

The research accumulated for this study was the legislative proceedings of the Solomon Amendment from its inception through its amendments to the current law. A summary of the Association of American Law Schools (AALS), "Don't Ask, Don't Tell" (DADT) Pub. L. 103-160 (10 U.S.C. § 654), and the Forum for Academic and Institutional Rights (FAIR). An analysis of the litigation history from the District Court of New Jersey, to the Third Circuit Court of Appeals to the Supreme Court of the United States. The petition, briefs, Amicus Curiae briefs, Oral Arguments and the decision of the

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[613] Google Enterprise Search Superstar, http://www.google.com/enterprise/superstars/justia.html (accessed May 24, 2007)

[614] Ibid

[615] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 79.

[616] Wren and Wren, The Legal Research Manual: A Game Plan for Legal Research and Analysis, 89.

Court were analyzed to address the research questions presented. The researcher also attended the Oral Arguments before the United States Supreme Court which provided a personal perspective on the proceedings.

Federal Court Structure

The United States Supreme Court is the highest court in the federal judiciary.[617] The United States Supreme Court consists of the Chief Justice of the United States and eight associate justices. The judges deciding the Solomon Amendment case were: Chief Justice John Roberts, Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, Antonin Scalia, David Hackett Souter, John Paul Stevens and Clarence Thomas.[618] The Supreme Court, at its discretion, hears a limited number of cases each year. The cases chosen by the Supreme Court involve Constitutional questions or federal law of national significance.

Congress has established two levels of Federal Courts under the Supreme Court: the District Courts and the Appellate Courts.[619] The United States District Courts are the trial courts of the Federal Court system. The District Courts have jurisdiction to hear both civil and criminal matters. There are 94 Federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico.[620] The 94 judicial districts are organized into 12 regional circuits, each of which has a United States court of

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[617] Understanding the Federal Courts: Structure of the Federal Courts, http://www.uscourts.gov/understand03/content_3_0.html (accessed November 25, 2007)

[618] Cornell University Law School: Current U.S. Supreme Court Justices, http://www.law.cornell.edu/supct/justices/fullcourt.html (accessed November 25, 2007)

[619] Understanding the Federal Courts: Structure of the Federal Courts, http://www.uscourts.gov/understand03/content_3_0.html (accessed November 25, 2007)

[620] Ibid

appeals.[621] A Court of Appeals hears appeals from the District Courts located within its circuit. The Federal courts can only decide certain types of cases as provided by Congress or as identified in the Constitution.[622]

A micro and macro analysis of the decision was performed using the theoretical perspectives of two legal scholars to provide insight and a perspective on Chief Justice Roberts' decision-making process and test the theory presented by Professor Jeffrey Rosen. The theories of Cardozo and Rosen were used as micro and macro lenses, respectively, to view and interpret the unanimous decision of the Supreme Court of the United States in *Rumsfeld v. FAIR*.

The micro legal analysis used the theories and teachings of Judge Benjamin Cardozo as a lens to view the judicial decision-making style of Chief Justice Roberts. The macro legal analysis utilized the theory presented by Jeffrey Rosen in his text "The Most Democratic Branch." This analysis was to determine if this decision by the Court supports or refutes the theory proposed by Jeffrey Rosen.

The micro legal analysis utilized the judicial decision-making template provided by Judge Benjamin Cardozo. Judge Benjamin Cardozo is considered one of the greatest American jurists and his landmark text "The Nature of the Judicial Process" is a booklet on judicial decision-making. This text was published in 1921 and still exerts influence among legal scholars and remains valuable to judges and students of law. Cardozo advocates a method for addressing the judicial decision-making process, which was applied to the opinion of the Court delivered by Chief Justice Roberts. The method

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[621] Ibid

[622] Ibid

identifies four sources of information that the judge uses for guidance in the judicial decision-making process. The sources of information are *Philosophy*, *Evolution*, *Tradition*, and *Sociology*. Figure 1 provides a graphical representation of Cardozo's four sources of information and their relationships. The circles identify each source of information and the process begins with the *Method of Philosophy* and then moves to the *Method of Evolution*, to the *Method of Tradition* and the *Method of Sociology* moderates and balances the other sources of information in the judicial decision-making process. The sources of information are identified as standalone sources; however, each leads to the next to complete the judicial decision-making template.

The researcher read Judge Benjamin Cardozo's text and performed content analysis of the material to extract the judicial decision-making template offered by Judge Benjamin Cardozo. The information gained from this analysis was applied to the decision of the Supreme Court of the United States in *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)* written by Chief Justice Roberts. The application consisted of identifying clues in the text of the decision to determine if Roberts incorporated or utilized the judicial decision-making template offered by Cardozo.

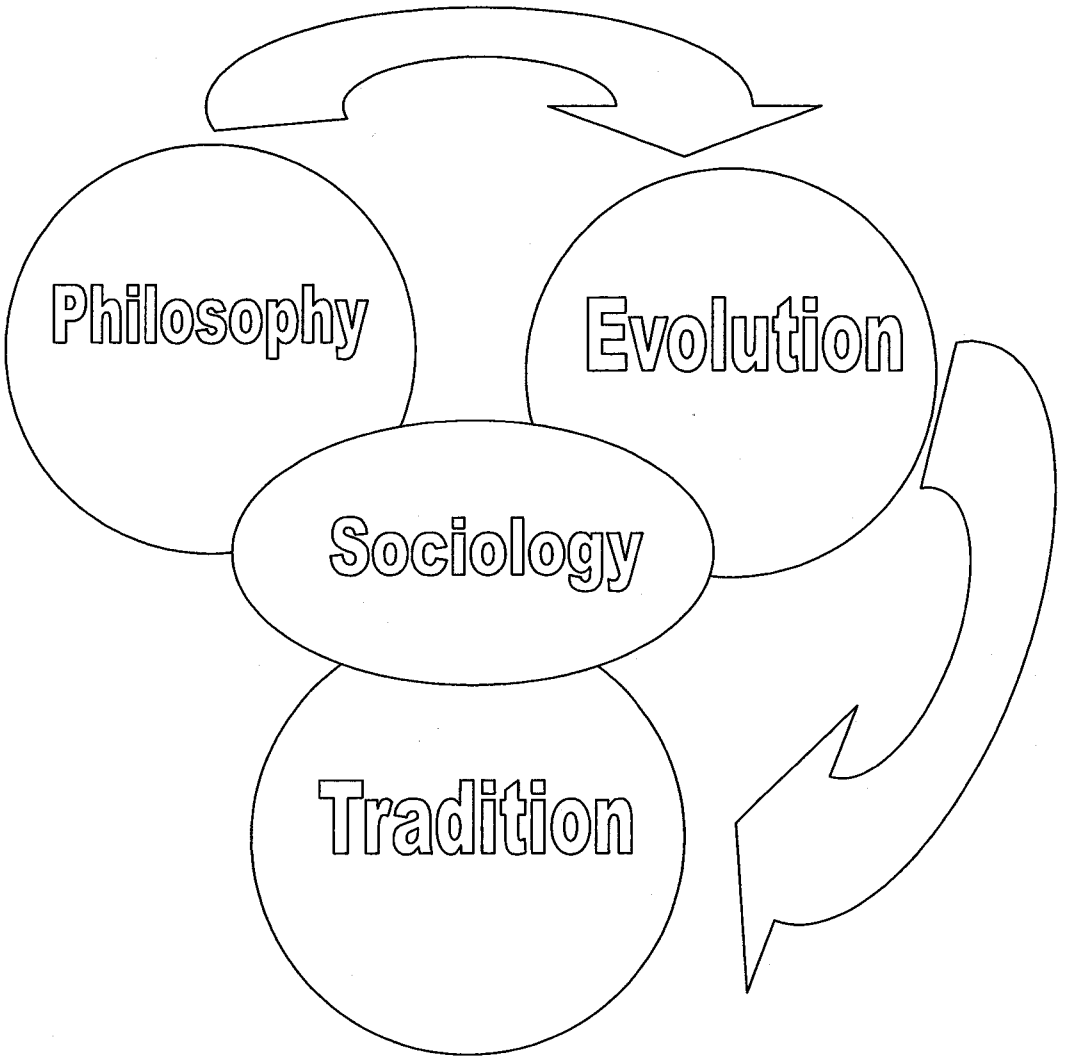

Figure 1. Illustration of Cardozo's four sources of information and their relationships.

Philosophy examines the logical progression of a principle in the judicial decision-making process. Cardozo contended that this "mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."[623] The *Method of Philosophy* prescribes that "if a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff."[624] Cardozo reasoned that "it will not do to decide the same question one way between one set of litigants and the opposite way between another."[625] This method is best explained by the use of precedents. Cardozo pointed out that "adherence to precedent must then be the rule rather that the exception if litigants are to have faith in the even-handed administration of justice in the courts."[626] The *Method of Philosophy* is "one organon among several" that is employed by judges. Cardozo warned that the "misuse of logic or philosophy begins when its method and its ends are treated as supreme and final."[627] Judges have to realize when the "...extension of a precedent goes to the limit of its logic."[628]

Evolution examines a line of historical development of a principle. Cardozo explained that "the tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history."[629] Cardozo

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[623] Benjamin N. Cardozo, The Nature of the Judicial Process: The Storrs Lectures Delivered At Yale University (New Haven and London: Yale University Press, 1921), 32.

[624] Cardozo, *The Nature of the Judicial Process*, 33.

[625] Cardozo, *The Nature of the Judicial Process*, 33.

[626] Cardozo, *The Nature of the Judicial Process*, 34.

[627] Cardozo, *The Nature of the Judicial Process*, 46.

[628] Cardozo, *The Nature of the Judicial Process*, 49.

[629] Cardozo, *The Nature of the Judicial Process*, 51.

identified that "some conceptions of the law owe their existing form almost exclusively to history"[630] These conceptions of the law are "not to be understood except as historical growths."[631] Cardozo explains that history "built up" the system and law of real property.[632] Other examples are "the powers and functions of an executor, the distinctions between larceny and embezzlement, the rules of venue and the jurisdiction over foreign trespass..." Cardozo further explained that evolution and history is not there to confine the law to "uninspired repetition of the law of the present and the past."[633] Evolution and history "illuminates the present, and in illuminating the present, illuminates the future."[634]

Tradition examines the customs of the community. Cardozo pointed-out "if history and philosophy do not serve to fix the direction of a principle, custom may step in."[635] Tradition is used "...not so much for the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied."[636] Cardozo stated that "custom must determine whether there has been adherence or departure" from general standards of right and duty..."[637] Tradition rests on "the prevailing standard of right conduct, the mores of the time."[638]

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[630] Cardozo, *The Nature of the Judicial Process*, 52.

[631] Cardozo, *The Nature of the Judicial Process*, 52.

[632] Cardozo, *The Nature of the Judicial Process*, 54.

[633] Cardozo, *The Nature of the Judicial Process*, 53.

[634] Cardozo, *The Nature of the Judicial Process*, 53.

[635] Cardozo, *The Nature of the Judicial Process*, 58.

[636] Cardozo, *The Nature of the Judicial Process*, 60.

[637] Cardozo, *The Nature of the Judicial Process*, 62.

[638] Cardozo, *The Nature of the Judicial Process*, 63.

Sociology balances and moderates the other sources of information in the judicial decision-making process. Sociology is based on the principle of social justice. Cardozo pointed out that "the final cause of law is the welfare of society."[639] Cardozo emphasized that "...when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[640] This micro legal analysis of the decision in *Rumsfeld v. Forum for Academic and Institutional Rights* will determine if the Chief Justice approached dispute resolution consistent with the teachings presented by Cardozo.

The macro legal analysis utilized the theory provided by legal scholar Jeffrey Rosen. Professor Jeffrey Rosen is a contemporary legal scholar who is the legal affairs editor of "The New Republic" and a professor of law at George Washington University.[641] His text "The Most Democratic Branch" presents a thesis regarding the role of the Supreme Court in our governance system and how the Supreme Court can maintain its independence.

Rosen's theory defies the conventional wisdom that the Supreme Court is a "counter-majoritarian force defying popular will or protecting minorities from the tyranny of the mob."[642] Rosen states "the idea that the federal courts might represent the views of national majorities more precisely than Congress is hard to reconcile with the familiar, if romantic, vision of the courts that many of us were taught in high school

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[639] Cardozo, *The Nature of the Judicial Process*, 66.

[640] Cardozo, *The Nature of the Judicial Process*, 65.

[641] The New Republic – A Journal of Politics and the Arts, http://www.tnr.com/showBio.mhtml?pid=60 (accessed January 23, 2006)

[642] Thomas Healy "A Review of Jeffrey Rosen's The Most Democratic Branch: How the Courts Serve America", http://writ.news.findlaw.com/books/reviews/20060804_healy.html (accessed January 23, 2006)

civics; courts are heroically antidemocratic institutions whose central purpose is to protect vulnerable minorities against the tyranny of the majority."[643] In this case FAIR would be considered the vulnerable minority and the Government would be considered the majority.

Rosen argues that the Supreme Court has traditionally deferred to the national consensus of opinion on important issues of constitutional law. Rosen states that "...the Court's relationship to public opinion is complicated: sometimes the Court identifies a strong national sentiment and imposes it on a few isolated state outliers (striking down and obsolete state ban on contraceptives, for example); and sometimes it endorses a position that roughly half the public supports and that comes to be more widely embraced (striking down school segregation)."[644] Rosen questions "whether the moderate justices on the Supreme Court are self-consciously reading the polls, neutrally interpreting the Constitution, or trying to compensate for other polarities in the system..." because "their high profile decisions, for much of the past two centuries, have been consistently popular with narrow majorities (or at least pluralities) of the American public."[645] Rather than thwarting democratic views, the Supreme Court has mirrored democratic views.

Rosen's theory also provides how the courts can best maintain their legitimacy and effectiveness over time. The courts legitimacy can best be maintained by decisions that are "...rooted in constitutional principles rather than political expediency."[646] Rosen

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[643] Jeffrey Rosen, *The Most Democratic Branch: How The Courts Serve America* (New York: Oxford University Press, 2006), 5.

[644] Rosen, *The Most Democratic Branch,* 4.

[645] Ibid

[646] Rosen, *The Most Democratic Branch,* 7.

identifies that "only with this kind of democratic legitimacy will the decisions be accepted, enforced, and followed by the political branches and the American people as a whole."[647] Rosen claims "...judges throughout American history have tended to maintain their democratic legitimacy in practice, ... when they have deferred to the constitutional views of the country as a whole."[648] The key to maintaining legitimacy and effectiveness is to avoid "... trying to impose constitutional principles in the face of active contestation by Congress..."[649] Congress is "the most reliable representative of the constitutional views of the American people..."[650] Rosen tempers this position by stating that "...Congress has not always been a reliable representative ..." therefore the Court should not always defer to Congress.[651] The Court can defer to the constitutional views of Congress only if Congress "...debate[s] issues in constitutional (rather than political) terms."[652] Rosen's theory is that the Supreme Court has and should continue to defer to the mainstream. This macro legal analysis will determine if the decision offered by the Supreme Court in the Solomon Amendment case supports or refutes Rosen's claims.

The researcher read the text and performed content analysis of the material to extract the theory offered by Jeffrey Rosen. The information gained from this analysis was applied to the decision of the Supreme Court of the United States in *Rumsfeld v. Forum for Academic and Institutional Rights* (FAIR) written by Chief Justice Roberts.

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[647] Ibid

[648] Rosen, *The Most Democratic Branch,* 8.

[649] Rosen, *The Most Democratic Branch,* 9.

[650] Ibid

[651] Ibid

[652] Ibid

The application consisted of identifying clues in the text of the decision to determine if the decision written by Chief Justice Roberts supported or refuted the theory offered by Jeffrey Rosen.

Chapter III Summary

Chapter III presented the methodology and the framework for understanding the template of judicial decision-making presented by Judge Benjamin Cardozo, and the theory of Jeffrey Rosen. Included was the structure of the federal court system in the United States, and the chapter summary.

CHAPTER IV

RESEARCH QUESTIONS

This chapter provides the answers to the research questions identified in Chapter I. Included are guidelines for higher education administrators in addressing the Solomon Amendment requirements as interpreted by the Supreme Court of the United States in *Donald H. Rumsfeld, Secretary of Defense, et al., v. Forum for Academic and Institutional Rights, Inc., et al.*

Q1. How did the U.S. Supreme Court resolve the dispute regarding the First Amendment challenges in the Rumsfeld case?

The First Amendment challenges involved in the Rumsfeld case were 'Unconstitutional Conditions', 'Freedom of Speech', and 'Expressive Association'. The unanimous decision written by Chief Justice Roberts began by providing the correct interpretation of the Solomon Amendment requirements. Justice Roberts wrote "In order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access."[653] This statement provided the basis for addressing the First Amendment challenges in the Rumsfeld case.

The Court addressed the arguments presented in the Amicus Curiae briefs from the William Alford and Harvard Law School Professors and the brief from 56 Columbia

[653] Opinion of the Court, No. 04-1152, 5.

Law School Faculty Members. Amici's interpretation of the Solomon Amendment and the actions required to be in compliance with the Solomon Amendment rested on the universal application of non-discrimination and recruitment policies adopted by the law schools. Amici argued that the "evenhanded application of universally applicable recruitment policies" satisfied the requirements of the Solomon Amendment because the policies insured that the military gained access to students and campuses "for the purposes of military recruiting in a manner that is at least equal in quality and scope to the access... that is provided to any other employer."[654] Applying Amici's interpretation of the Solomon Amendment would allow law schools and higher education institutions to bar military recruiters as a discriminatory employer from their campuses under the universal application of their nondiscrimination policies.

The Court rejected this interpretation stating that the "statute does not call for an inquiry into why or how" an employer received its access.[655] The Solomon Amendment "does not focus on the content of a school's recruiting policy..."[656] The Solomon Amendment "looks to the result achieved by the policy ..."[657] Therefore, "applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military."[658] To comply with

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[654] Brief of *Amicus Curiae* 56 Columbia Law School Faculty Members, 3, http://www.law.georgetown.edu/solomon/documents/FAIRamicusColumbiaFaculty.pdf (accessed August 10, 2007)

[655] United States Supreme Court. Opinion of the Court No. 04-1152. *Donald H. Rumsfeld, Secretary of Defense, ET AL., Petitioners v. Forum for Academic and Institutional Rights, INC., ET AL.*, 6, http://www.supremecourtus.gov/opinions/05pdf/04-1152.pdf (accessed January 3, 2007)

[656] Ibid., 7.

[657] Ibid

[658] Ibid

the Solomon Amendment "military recruiters must be given the same access as recruiters who comply with the policy."[659] Regardless of the employment practices of the military, they were to be provided access equal in scope to other recruiters who were not discriminatory employers.

The doctrine of 'Unconstitutional Conditions' is based on the principle that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech."[660] So, if military recruiters' access required by the Solomon Amendment violated the 'Free Speech' rights of the Respondents, then it would be a violation of the principle of 'Unconstitutional Conditions'. The Court addressed the 'Unconstitutional Conditions' claim by explaining Congress's constitutional power to raise and support a military. Justice Roberts explained that "there is no dispute in this case that it includes the authority to require campus access for military recruiters."[661] The Solomon Amendment was Congress's way of securing access to higher education campuses to support the constitutionally mandated power of raising and supporting a military as provided in Art. 1 § 8 of the United States Constitution. The Court then provided that the judicial deference afforded Congress "...is at its apogee when it legislates under its authority to raise and support armies."[662] Justice Roberts stated that "the Solomon Amendment gives

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[659] Ibid., 8.

[660] Quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)

[661] Opinion of the Court, No. 04-1152, 8.

[662] Quoting Rostker v. Goldberg, 453 U.S. 57, 67 (1981)

universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds."[663]

Justice Roberts then addressed the 'Free Speech' or 'Compelled Speech' claim and identified that "the Solomon Amendment neither limits what law schools may say nor requires them to say anything."[664] The opinion emphasized that the Respondents were "free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all while retaining eligibility for federal funds."[665] Justice Roberts also reasoned that the Solomon Amendment "regulates conduct, not speech"[666]

Justice Roberts stated that the precedent setting cases of *Dale* and *Hurley*, controlling 'Compelled Speech' "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[667] The Solomon Amendment does not "...affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[668]

The 'Expressive Association' claim was addressed by explaining the Supreme Court decision in *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000). The Court explained unlike *Dale*, military recruiters were "...outsiders who come onto campus for the limited purpose of trying to hire students – not to become members of the school's

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[663] Opinion of the Court, No. 04-1152, 8.

[664] Opinion of the Court, No. 04-1152, 10.

[665] Ibid

[666] Ibid

[667] Ibid., 13.

[668] Ibid., 14.

expressive association."[669] The military recruiters were not attempting to become part of the law schools membership (administrators, faculty members, placement personnel) and, therefore, the law schools associational rights were not violated. The Court pointed out that "students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable."[670] The Court further asserted that "a military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."[671]

In summary, the Court resolved the First Amendment challenges brought by FAIR by first explaining the correct interpretation of the Solomon Amendment requirements in relation to the application of nondiscrimination policies of law schools. The Amicus Curiae briefs for Respondents from 56 Columbia Law School faculty and William Alford, that argued the universal application of law school nondiscrimination policies met the requirements of the Solomon Amendment, was singled out as the incorrect interpretation of the Solomon Amendment requirements by Chief Justice Roberts. Chief Justice Roberts explained the application of law schools nondiscrimination policies did not meet the requirements of the Solomon Amendment because military recruiters would not receive equal access compared to employers who met the requirements of the nondiscrimination recruitment policies.

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[669] Opinion of the Court, No. 04-1152, 19.

[670] Ibid., 20.

[671] Ibid

The 'Unconstitutional Condition' claim was addressed by explaining that universities were provided a choice under the Solomon Amendment. Institutions of higher education who did not want to comply with Solomon Amendment requirements were free to forgo federal funds.[672] Those institutions of higher education that agreed to the receipt of federal funds were required to comply with the requirements of the Solomon Amendment. Chief Justice Roberts reasoned there could not be an unconstitutional condition if the recipients were provided a choice in accepting the conditions.

Chief Justice Roberts also pointed out there were no 'Free Speech' or 'Compelled Speech' violations, because the Solomon Amendment did not require law schools to speak or limit speech.[673] Law schools were free to express their dissatisfaction with the military's employment practices in regards to homosexuals in the military and still be in compliance with the Solomon Amendment. Justice Roberts emphasized the Solomon Amendment regulated the conduct of law schools and institutions of higher education as it related to military recruiters access to their campuses.

The 'Expressive Association' claim was addressed by identifying the fact that military recruiters, like other employment recruiters, were not part of the law school or institution of higher education and was not requesting to be members of the organization.[674] Law schools were not required under the Solomon Amendment to accept military recruiters as members of their expressive association. Justice Roberts explained

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[672] Opinion of the Court, No. 04-1152, 8.

[673] Opinion of the Court, No. 04-1152, 10.

[674] Opinion of the Court, No. 04-1152, 20.

that recruiters were visitors on campus for the purpose of recruiting students for employment. Justice Roberts also reiterated that the message of the recruiters that came to campus to recruit would not be construed as the message of the law schools. Therefore, the law schools were not required to speak for the military or for any other recruiters that visited the campus.

Q2. What were the major arguments in the judicial process that influenced the U.S. Supreme Court's decision?

The major arguments in the judicial process that influenced the Supreme Court's decision were the interpretations of First Amendment precedent setting cases in *Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al.* 515 U.S. 557 (1995)[675], *Boy Scouts of America et al. v. Dale* (2000)[676], and *United States v. American Library Association Inc.,* 539 U.S. 194, 210 (2003).[677] The Court relied on interpretations of these cases and their interpretation of federal funding conditions to support their decision.

The decision and reasoning in *Hurley* was used to refute the 'Compelled Speech' claims of FAIR. In *Hurley*, the Court held that the forced inclusion of a parade unit that the organizers did not want to include among the marchers violated the First Amendment rights of the parade organizer. This reasoning is based on the right of the organizers to

[675] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., http://supreme.justia.com/us/515/557/case.html (accessed May 24, 2007)

[676] Boy Scouts of America et al. v. Dale, http://supreme.justia.com/us/530/640/case.html (accessed May 17, 2007)

[677] United States et al. v. American Library Association, Inc., et al., http://supreme.justia.com/us/539/194/case.html (accessed May 28, 2007)

"tailor" their speech and "choose" the content of their message.[678] The parade was a "form of expression" that fell under the protection of the First Amendment.[679] FAIR used this reasoning to argue that the Solomon Amendment violated the speech of the law schools because the law schools were being forced to alter their message and accommodate the message of the military recruiters. The message of the law schools was that they do not support discriminatory employers as expressed in their non-discrimination policies and their recruitment policies. In the opinion delivered by the Court, it was pointed out that "...a law school's decision to allow recruiters on campus is not inherently expressive."[680] Justice Roberts reasoned that law schools allowed recruiters on campus for the purpose of recruiting students not as a form of expression like the parade organizers in *Hurley*. The Court further reasoned that "a law school's recruiting services lack the expressive quality of a parade..." The ruling in *Hurley* identified that the parade was organized to express the message of its organizers. The organizers of the parade selected participants that supported their expressive message and denied those participants who did not. It was stated that the "military recruiters message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."[681]

In *Boy Scouts of America v. Dale*, The Court affirmed the associational rights of the Boy Scouts by not allowing a state law to affect the membership decisions of the Boy Scout organization. Under the state law, the Boy Scouts were required to associate and

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[678] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al., http://supreme.justia.com/us/515/557/case.html (accessed May 24, 2007)

[679] Ibid

[680] Opinion of the Court, No. 04-1152, 14.

[681] Ibid., 15.

include as a member an openly homosexual individual which was in opposition to their views on homosexuality and leadership in the Boy Scouts. The Boy Scouts were being forced to accept an openly gay person as a member of their organization and that interfered with the Boy Scouts expressive association.

FAIR used the decision in *Dale* to argue that the Solomon Amendment violated the expressive association of law schools. Law schools were expressive associations that wanted to exclude military recruiters from their expressive association.

The Court's interpretation of *Dale* identified a "critical" difference between the Rumsfeld case and *Dale* – group membership.[682] In *Dale*, the Boy Scouts were being forced to accept a member that they did not desire. In this case, law schools are not being forced to accept military recruiters as members of their 'Expressive Association.'

Congress's ability to condition the receipt of federal funds was a major argument in the case that was used by the Court to support their decision. The Court recognized that there were limits to Congress's ability to condition the receipt of federal funds and stated in *United States v. American Library Association Inc.*, 539 U.S. 194, 210 (2003) that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected... freedom of speech..."[683] *United States v. American Library Association* involved the conditioning of federal funds to public libraries that installed internet filters to protect minors from illegal pornography. Public libraries were required to install Internet filters to be eligible for federal funding and discounts associated with the Erate program and grants under the Library Services and Technology Act (LSTA).

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[682] Opinion of the Court, No. 04-1152, 19.

[683] *United States v. American Library Association Inc.*, 539 U.S. 194, 210 (2003)

FAIR argued that the Solomon Amendment "forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding to their universities."[684]

FAIR's reasoning and interpretation of the *American Library Association* precedent would make the Solomon Amendment unconstitutional because it denied a benefit to the law schools by infringing on their freedom of speech. The opinion delivered by the Court distinguished this case from the *American Library Association* case by stating, "this case does not require us to determine when a condition placed on university funding ...becomes an unconstitutional condition."[685] The Courts' reasoning was that a funding condition could not be "unconstitutional if it could be constitutionally imposed directly."[686] The Court determined that the Solomon Amendment would be constitutional if directly imposed by Congress as a mandate because "the statute does not place an unconstitutional condition on the receipt of federal funds."[687] The Solomon Amendment provided law schools and institutions of higher education with a choice, accept federal funds and comply with the Solomon Amendment requirements of military recruiter access or forgo federal funds and deny military recruiter access.

In summary, the major arguments in this case revolved around the interpretation of legal precedents controlling 'Compelled Speech', 'Expressive Association' and

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[684] Opinion of the Court, No. 04-1152, 3.

[685] Ibid., 9.

[686] Ibid., 10.

[687] Ibid

'Unconstitutional Conditions'. The Court refuted FAIR's reasoning and interpretation of *Dale*, *Hurley* and ALA. The Court also identified that Congress could have mandated the Solomon Amendment, however Congress chose to provide law schools with a choice and utilized its Spending Authority to encourage law schools and institutions of higher education to allow military recruiters access to their campuses.

Q3. Does the opinion of Chief Justice Roberts' indicate that he has used or uses the judicial decision-making template proposed by Judge Benjamin Cardozo?

In analyzing the opinion utilizing the judicial decision-making template provided by Judge Benjamin Cardozo, it is apparent that the opinion written by Chief Joseph Roberts conforms with Cardozo's judicial decision-making template. See Figure 1.

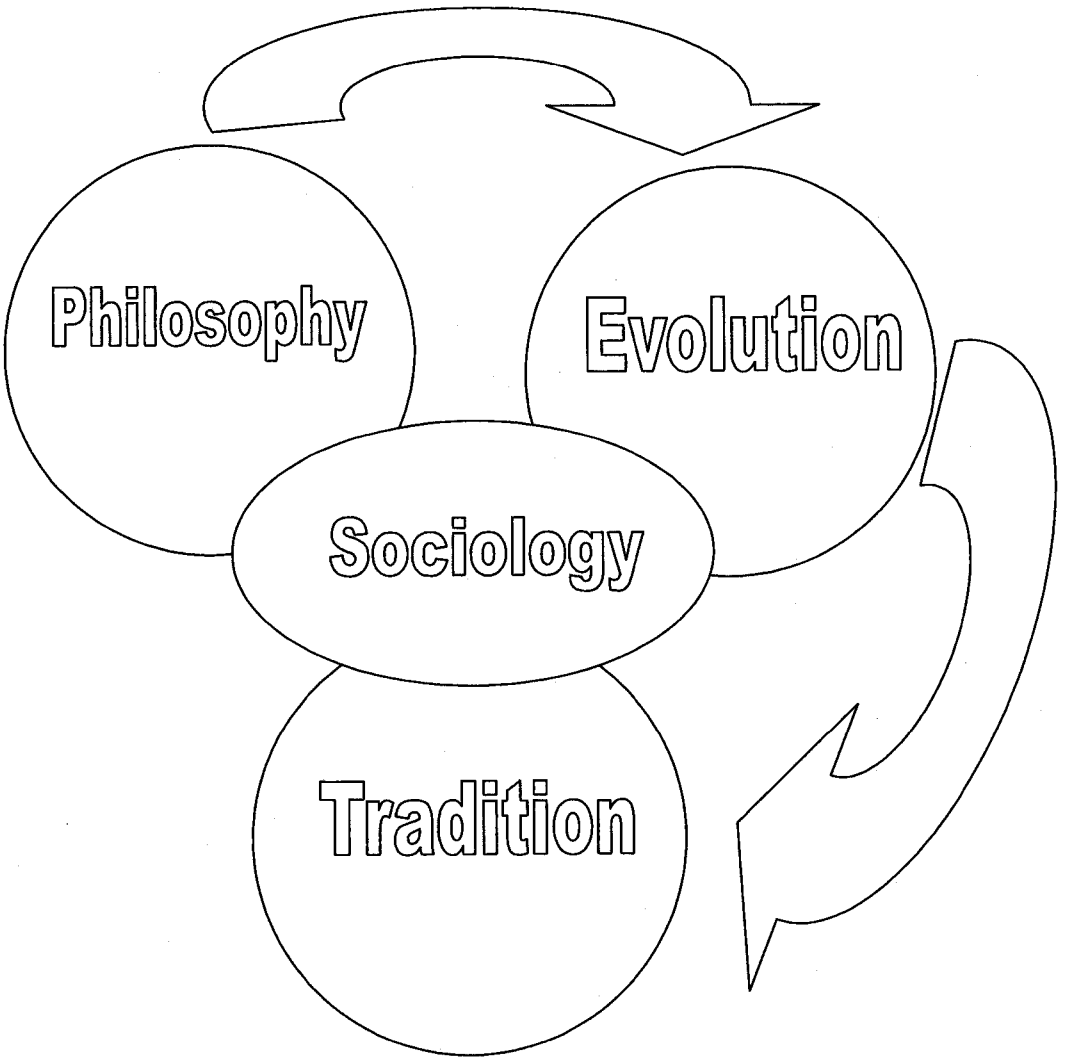

Figure 1. Illustration of Cardozo's four sources of information and their relationships.

Applying the *Method of Philosophy* to the opinion, the researcher found that Justice Roberts relied heavily on precedent. Cardozo contended "the first thing he (judge) does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books."[688] He also proposed that precedents are "the point of departure from which the labor of the judge begins."[689] Chief Justice Roberts acknowledges the importance of precedents by referencing several precedent setting cases related to 'Unconstitutional Conditions', 'Freedom of Speech' and 'Freedom of Association' to decide the case in favor of the petitioners. As discussed above, the interpretations of *Dale*, *Hurley* and *ALA* were the major arguments in this decision. Justice Roberts also cited *Wooley v. Maynard*, 430 U.S. 705 (1977), in which the Court found unconstitutional a state law that required a New Hampshire motorists to display the state motto on their license plates as a case that provided additional authority in rejecting the claims brought by FAIR.

Wooley involved a New Hampshire statute that required motor vehicles license plates to display the state motto "Live Free or Die." George Maynard was a Jehovah's Witness and due to his religion covered up the motto on the license plates of his personal vehicle. Maynard was fined on three separate occasions for violating the statute and was sentenced to serve fifteen days in jail. Maynard brought suit in United States District Court for the District of New Hampshire seeking injunctive and declaratory relief against enforcement of the New Hampshire statute. The District Court enjoined the State from arresting and prosecuting the Maynards for covering their license plates. The Supreme

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[688] Cardozo, The Nature of the Judicial Process, 19.

[689] Cardozo, The Nature of the Judicial Process, 20.

Court of the United States affirmed the District Court's ruling and ruled that the State of New Hampshire could not constitutionally require an individual to display the State's motto on their personal vehicle if the owners of the vehicle found the message objectionable to their moral and philosophical beliefs.

Roberts stated that there was "nothing in this case approaching a Government-mandated pledge or motto that the school must endorse."[690] Law schools were not required by the Solomon Amendment to display the military's employment practices on their campuses or personal vehicles. The Solomon Amendment did not require law schools to speak or limited the speech of law schools. Roberts use of precedents to compare and contrast the claims of FAIR mirrors Cardozo's *Method of Philosophy* where the judge uses logic to "...match the colors of the case at hand against the colors of many sample cases..."[691] Cardozo pointed out that "...no system of living law can be evolved by such a process and no judge of a high court, worthy of his office, views the function of his place so narrowly."[692] Under Cardozo's reasoning the work of a judge does not stop at the application of precedents.

Analyzing the decision using the templates *Method of Evolution*, it is apparent that Chief Justice Roberts utilized this source of information as a component of his decision-making process. Cardozo pointed out "...the effect of history is to make the path of logic clear."[693] Justice Roberts was not willing to expand the interpretation of precedents further than what was established by their histories. In the opinion, Justice

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[690] Opinion of the Court, No. 04-1152, 12.

[691] Cardozo, *The Nature of the Judicial Process*, 20.

[692] Ibid

[693] Cardozo, The Nature of the Judicial Process, 51.

Roberts stated "...FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."[694] Chief Justice Roberts also concluded that FAIR "...plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents."[695] Following the *Method of Evolution* is the *Method of Tradition.*

The *Method of Tradition* addresses the customs of a community, the "...mores of the time" as a source of information.[696] In analyzing the decision through the *Method of Tradition*, Justice Roberts chose to recognize and emphasize the customs of the community related to the military. The law school's desire to enforce its nondiscrimination policy as a custom of its institution failed to garner the support of Chief Justice Roberts when in opposition to the customs of the military and Congress's constitutional mandate to raise and support a military. In the Opinion, Justice Roberts stated "the Solomon Amendment does not focus on the content of a school's recruiting policy..."[697] This statement subordinates the policies and customs of the law schools to that of the military. Justice Roberts also stated that "law schools must ensure that their recruiting policy operates in such a way that military recruiters are given access to students at least equal to that provided to any other employer."[698] The application of a non-discrimination policy as a custom of the law school was "insufficient" to comply

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[694] Opinion of the Court, No. 04-1152, 20.

[695] Ibid

[696] Cardozo, The Nature of the Judicial Process, 63.

[697] Opinion of the Court, No. 04-1152, 7.

[698] Opinion of the Court, No. 04-1152, 7.

with the requirements of the Solomon Amendment.[699] Chief Justice Roberts utilized the *Method of Tradition* to support the authority of Congress and the role and customs of the military.

Cardozo proposed that "the final cause of law is the welfare of society."[700] The *Method of Sociology* is based on the principle of social justice. The *Method of Sociology* balances and moderates the other sources of information used in the judicial decision-making process. Cardozo reasoned "...there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends."[701]

Careful analysis of the Opinion delivered by Chief Justice Roberts reveals the use of an appeal to the *Method of Sociology*. The decision provided, in theory, a choice for the law schools and universities. Law schools and universities could refuse federal funds and not be subject to the requirements of the Solomon Amendment. The decision also provided an avenue for free speech because the law schools and universities are free to protest the military and their hiring practices while remaining in compliance with the Solomon Amendment. The cause of the military and Congress was also supported by the decision. Congress is empowered under Art. 1 § 8 to raise and support a military, and this decision supports this authority by providing for the recruitment of college and university trained personnel to fill the ranks of an all-voluntary military. In our current time of war and the role the military plays in national security, this decision conforms with the *Method of Sociology* and pursues law for the "welfare of the society."[702]

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[699] Ibid., 8.

[700] Cardozo, *The Nature of the Judicial Process*, 66.

[701] Cardozo, *The Nature of the Judicial Process*, 65.

[702] Cardozo, The Nature of the Judicial Process, 66.

In summary, it is apparent that the opinion written by Chief Joseph Roberts was influenced by Cardozo's judicial decision-making template. Justice Roberts utilized the *Method of Philosophy* by the application of precedents to provide authority for the unanimous opinion. Chief Justice Roberts also incorporated the *Method of Evolution* in this decision by not expanding the interpretation of precedents further than what was established by their histories. The *Method of Tradition* was found in this opinion written by Chief Justice Roberts. Justice Roberts chose to recognize and emphasize the customs of the community related to the military. Justice Roberts supported the authority of Congress and the role and customs of the military. In balancing the other sources of information presented in the judicial decision-making template offered by Judge Benjamin Cardozo, the *Method of Sociology* was found in this decision penned by Chief Justice Roberts. The decision provides for the general welfare of society by providing the military with an avenue to recruit at college and university campuses in support of an all-voluntary military.

Q4. Does the decision support or refute the theory of Jeffrey Rosen regarding the role of the Supreme Court in our governance system?

The decision supports the thesis of Jeffrey Rosen. As discussed in Chapter III, Rosen's theory is courts are not "antidemocratic institutions whose central purpose is to protect vulnerable minorities against the tyranny of the majority."[703] Rosen's theory is the Supreme Court has traditionally deferred to the national consensus of opinion on important issues of constitutional law. Under Rosen's theory, Congress provides the

[703] Rosen, The Most Democratic Branch, 5.

national consensus of opinion because Congress is "the most reliable representative of the constitutional views of the American people..."[704]

Analyzing the decision in relation to Rosen's theory, it is clear that the Supreme Court relied heavily on the direction provided by Congress. Justice Roberts stated that the "task" of the Court "...is to construe what Congress has enacted."[705] Justice Roberts explained that the application of a general nondiscrimination policy did not fulfill the requirements of the Solomon Amendment for equal access and stated this interpretation of equal access was "...clearly not what Congress had in mind in codifying the DoD policy."[706] The Court's interpretation of the Solomon Amendment requirements echoed the will of Congress. The interpretation of the Solomon Amendment requirements by FAIR and the legal experts that served as Amici was "clearly" wrong.[707]

In addressing the alternative methods of recruiting that were proposed by FAIR and the Court of Appeals that may be less intrusive and as effective as recruiting on campus, Roberts and the Court explained that "the issue is not whether other means of raising an army and providing for a navy might be adequate."[708] Roberts writing for the Court decided that recruiting methods and determining what was effective "...is a judgment for Congress, not the courts."[709] The Court relied on what Congress provided as appropriate and effective for military recruitment; "it suffices that the means chosen by

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[704] Rosen, The Most Democratic Branch, 9.

[705] Opinion of the Court, No. 04-1152, 6.

[706] Opinion of the Court, No. 04-1152, 8.

[707] Ibid

[708] Opinion of the Court, No. 04-1152, 18.

[709] Ibid

Congress add to the effectiveness of military recruitment."[710] The Court relied on the expertise of the elected representatives in Congress, not that of law schools and their career services personnel. These statements in the Opinion support Rosen's theory that the Supreme Court followed the will of Congress, and therefore the national consensus.

Rosen's theory also suggests what the Court should do to maintain its legitimacy and effectiveness. Rosen claims that the "most controversial" part of his theory is not the "...historical claim that judges have tended to maintain their legitimacy and independence in the past by deferring to the constitutional views of the American people; instead, it will be the prescriptive claim that they should continue to do so in the future."[711] Rosen claims the key to maintaining legitimacy and effectiveness for the Court is to avoid "... trying to impose constitutional principles in the face of active contestation by Congress..."[712] This case was a direct challenge of Congress and the government on constitutional principles. In this challenge FAIR represented the "vulnerable minority" and the government represented the "tyranny of the majority."[713]

In summary, the Court followed the will of Congress and therefore supported the national consensus. The Court's decision in this case supports the national consensus and favored the majority, thereby offering support for Rosen's theory.

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[710] Ibid

[711] Rosen, The Most Democratic Branch, 15.

[712] Rosen, The Most Democratic Branch, 9.

[713] Rosen, The Most Democratic Branch, 5.

Q5. What implications does the decision have on college and university policies, procedures and operations?

One obvious implication of the decision for college and university policies, procedures, and operations will be the requirement to allow military recruiters to recruit on campus with the same level of access as other recruiters. This may present problems due to the potential protests involved with the military recruiters at the same recruiting venues as other potential employers. On Tuesday, April 11, 2006, military recruiters left a job fair being held at University of California at Santa Cruz after a crowd of student protesters blocked the entrance to the building where the Army and National Guard had set up information tables.[714] The military recruiters had to escorted off campus by university police officers "...before things got out of hand and someone got injured.[715]

The student group "Students Against War" wanted to prevent the military from participating in the biannual job fair held for students at UC Santa Cruz and organized the protest.[716] University officials were aware of the planned protest and had discussions with the student group prior to the job fair.[717] University officials were attempting to insure safety for the campus community and its visitors, allow students to protest and exercise their right to free speech, and provide the required access to military recruiters. This balancing act will be required by college and university administrators across the country.

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[714] Diana Walsh, Military recruiters, confronted by crowd, leave campus job fair Anti-war protesters at university block doors to building, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/04/12/BAG3KI7INT1.DTL (accessed February 9, 2008)

[715] Ibid

[716] Ibid

[717] Ibid

This incident identifies some of the implications for college and university policies, procedures and operations. University administrators will have to develop policies and procedures that provide for campus safety and also provide for the exercise of free speech. One suggestion for the exercise of free speech would be the establishment of "free speech/conduct zones" away from the facility where the recruiting services will be located. Establishment of these zones could alleviate potential problems of protesters affecting the access provided military recruiters. The zones would assist the law schools and institutions of higher education in complying with the Solomon Amendment requirements while reducing any potential disruption to campus operations and to other employment recruiters. Recruiting zones could also be designated that prohibited protests from faculty, staff and students. The establishment of these zones would help to alleviate the potential problems of protesters affecting the access provided military recruiters.

University officials will also have to work with campus safety and police departments to insure adequate security and police presence during recruiting events. Involvement of campus safety and police personnel should be adequate to address the safety concerns without giving the impression of hostility or force which may lead to additional problems.

University policies should be developed to address a proactive approach to student group protestors. Students should be informed of their responsibility under the student conduct code or student judicial code. Students that interfere with military recruiters' access to campus should receive an appropriate disciplinary action that is in concert with the student conduct codes. Student should also be made aware of counseling

services that are available to students, and how these services can assist the student if they have anger or resentment toward the military of students in uniform.

In summary, there should be policies and procedures advanced that increases communication among the numerous professional schools and colleges to develop synergy and unity in addressing issues. Institutions of higher education are arranged and managed in silos. Professional schools and colleges are silos of expertise, and this can create a myopic view of issues. The Solomon Amendment case was a challenge brought by a group of university law schools and not parent institutions. This challenge by a select group of university law schools endangered funding for parent colleges and universities. Policies should be developed to manage professional schools and colleges within an institution to insure that the institution is working as a community and not as individual units.

In offering guidelines to university administrators in addressing the Solomon Amendment the American Association of Collegiate Registrars and Admissions Officers (AACRAO) has produced the "Solomon Amendment – A Guide for Recruiters and Student Records Managers." This guide provides administrators with information that "...will educate military recruiters and campus record keepers about the limits and extent of the Solomon Amendment law..."[718] Information contained in the guide addresses areas such as military recruiters request for information, student rights to release their

[718] Solomon Amendment: A Guide for Recruiters and Student Records Managers, http://www.aacrao.org/publications/Solomon.pdf (accessed January 25, 2008)

information, compliance issues, and suggestions on how to improve relationships between colleges and military recruiters.[719]

In August 2007 the National Association for Law Placement (NALP) published the "Amelioration Best Practices Guide" to provide member schools of the Association of American Law Schools (AALS) with information to ameliorate the on-campus presence of military recruiters.[720] The guide also provides a list of books, articles and online resources related to amelioration activities at law schools.

As part of their membership in the Association of American Law Schools member schools are required to ameliorate the presence of military recruiters at their law school. The identified purpose of the guide is "to provide a variety of steps that can be tailored to specific types of schools."[721]

The guide offers three suggestions to law schools. The first suggestion is for law schools to convene a group of faculty, staff and students on an annual basis to communicate and evaluate the current amelioration practices and to suggest new amelioration practices. The second suggestion is for law schools to work with their students, faculty, and staff to devise strategies that could be proposed to Congress for the repeal of "Don't Ask, Don't Tell." The third suggestion is for law school faculty and staff to communicate with their Gay, Lesbian, Bisexual, Transgendered (GLBT) students what kind of support they require.

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[719] Solomon Amendment: A Guide for Recruiters and Student Records Managers, http://www.aacrao.org/publications/Solomon.pdf (accessed January 25, 2008)

[720] National Association for Law Placement: Amelioration Best Practices Guide, http://www.nalp.org/assets/860_07ameliorationbestpractic.pdf (accessed January 25, 2008)

[721] Ibid

The suggestions from the NALP propose that communication is the key in achieving the amelioration efforts required by the AALS. Law schools should communicate with their faculty, staff and students in addressing the Solomon Amendment requirements and the amelioration requirements of the AALS. Communication with the parent institution should also be part of the suggestions. The guide only suggests communication with law school faculty, staff and students. As a subelement of the parent organization the law school should communicate with the parent organization. This communication is required to build cohesiveness in the organization, and to address the problems of a subelement as that of the institution.

The suggestion of devising strategies to advocate for the repeal of "Don't Ask, Don't Tell" should be an obvious choice for law schools. Law schools are educating their students about law and the function of law in our democracy. Laws are created and amended through legislation. The legislative process should be the first avenue that law schools use in advocating a change in a current law, not litigation. Law schools should provide their faculty, student, and staff with a listing of their Congressional representatives, and advocate for the repeal of "Don't Ask Don't Tell" instead of pursuing litigation that jeopardized federal funding to the parent organization.

Based on the researchers' analysis, these guides are beneficial in understanding and complying with the Solomon Amendment. The guides also provide university officials with information to understand the Association of American Law Schools member school requirements. University officials to develop policies and procedures that drive the university as a cohesive unit should use the guides.

Q6. What new questions or issues emerged from this decision?

One question that emerged from the decision is: What level of protest and speech will be allowed by military recruiters before the higher education institution or law schools are not in compliance with the Solomon Amendment? In the Oral Arguments SG Clement stated law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests."[722] He also stated, "if the recruiting office engages in conduct that effectively negates the access that they're providing, then I think you would have a different situation."[723] This statement suggested that there is a level of conduct that could effectively prohibit military recruiters from obtaining equal access. Determining this level of conduct will be trial and error for higher education institutions and law schools.

A second issue would be what level of influence the federal government will have on higher education institutions that accept federal funding. The unanimous decision in this case ruled "the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement..."[724] The Solomon Amendment could have been mandated by Congress, however, Congress "...chose to secure campus access for military recruiters indirectly, through its Spending Clause power."[725] This decision and interpretation of Congress's power to legislate in matters of military affairs solicits the question about the limits of government influence at higher education institution that

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[722] Oral Argument Transcripts 04-1152, lines 12-14, 25.

[723] Oral Argument Transcripts 04-1152, lines 22-25, 24.

[724] Opinion of the Court, No. 04-1152, 10.

[725] Opinion of the Court, No. 04-1152, 8.

accept federal funding. Could Congress as a condition on federal funding require college and universities to accept military personnel as part of their student body? Could Congress require employment of government personnel at college and university campuses in support of military grants that support national security? As identified by this case, law schools and institutions of higher education have recourse to bring suit for any activity by the government that it perceives infringes their constitutionally protected rights.

Chapter IV Summary

Chapter IV presented the answers to the research questions provided in Chapter I. The Court resolved the dispute regarding the First Amendment challenges in the Solomon Amendment by providing their interpretation of precedent setting cases and comparing and contrasting these cases with the requirements of the Solomon Amendment.

The major arguments in the judicial process were the interpretation of Supreme Court decisions in *Boy Scouts of America et al. v. Dale* (2000), *Hurley et al. v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., et al.* 515 U.S. 557 (1995), and United States v. American Library Association Inc., 539 U.S. 194, 210 (2003). The Court relied on interpretations of these cases and their interpretation of federal funding conditions to validate their decision.

Examining the opinion through the lens of Judge Benjamin Cardozo's judicial decision-making template identified that the opinion delivered by Chief Justice Roberts was influenced by the template offered by Judge Benjamin Cardozo. The decision also supports the theory advanced by Jeffrey Rosen that the Court followed the will of Congress and supported the majority will.

This decision solicited new questions related to the level of protests that will be allowed before universities are in non-compliance with the equal access requirements of the Solomon Amendment. The level of government influence at college and universities that accept federal funding was a new question that this decision solicited. The implications on college and university policies addressed the need for rules related to military recruiting on campus at recruitment venues with other potential employers. Campus safety, security of visitors, free speech and conduct expression were also addressed. Policies should be developed by presidents and upper level management that enhance communications across professional schools, colleges and departments to address concerns and issues. Also included were guidelines provided by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), the National Association of Law Professionals (NALP) and the chapter summary.

CHAPTER V

SUMMARY, RECOMMENDATIONS, CONCLUSIONS

Summary

The opinion of the Court in the Rumsfeld case settles a long-standing issue between military recruiters and college and university campuses regarding campus access for military recruiting. The issue of military recruiters on campus has been an issue on some college and university campuses since the early 1970's. The Solomon Amendment was enacted to encourage college and university campuses to allow military recruiters on their campuses and provide them with the assistance provided any other recruiter. A coalition of Law Schools, the Forum for Academic and Institutional Rights (FAIR) was created to challenge the constitutionality of the Solomon Amendment. FAIR claimed that the Solomon Amendment infringed on their constitutional First Amendment rights of freedom of speech, association and the funding penalty constituted an unconstitutional condition on the receipt of federal funds.

In the District Court, FAIR lost and appealed to the Third Circuit Court of Appeals and there FAIR was victorious. The case was selected by the Supreme Court of the United States and in this venue, FAIR lost on all counts. The decision of the Court was a unanimous decision and was one of the early decisions of Chief Joseph Roberts.

Chief Justice Roberts took his seat on the Court on September 29, 2005.[726] The Supreme Court decision in *Rumsfeld v. FAIR* was handed down on March 6, 2006.[727] The decision written by Chief Justice Roberts provided an opportunity to investigate his judicial decision-making style.

Judge Benjamin Cardozo is considered one of the greatest American jurists and his text "The Nature of the Judicial Process" is a booklet on judicial decision-making. This text was published in 1921 and still exerts influence among legal scholars and remains valuable to judges and students of law. Cardozo advocates a method for addressing the judicial decision-making process, which was applied to the opinion delivered by Chief Justice Roberts. Analyzing the decision through the lens of Judge Benjamin Cardozo's judicial decision-making template suggests that Roberts, in this decision, utilized the template offered by Cardozo.

The method identifies four sources of information that the judge uses for guidance in the judicial decision-making process. The sources of information are *Philosophy*, *Evolution*, *Tradition*, and *Sociology*. Figure 1 provides a graphical representation of Cardozo's four sources of information and their relationships. The circles identify each source of information and the process begins with the *Method of Philosophy* and then moves to the *Method of Evolution*, to the *Method of Tradition* and the *Method of Sociology* moderates and balances the other sources of information in the judicial

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[726] The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (accessed February 5, 2008)

[727] Supreme Court of the United States Docket 04-1152, http://www.supremecourtus.gov/docket/04-1152.htm (accessed January 24, 2006)

decision-making process. The sources of information are identified as standalone sources, however, each leads to the next to complete the judicial decision-making template.

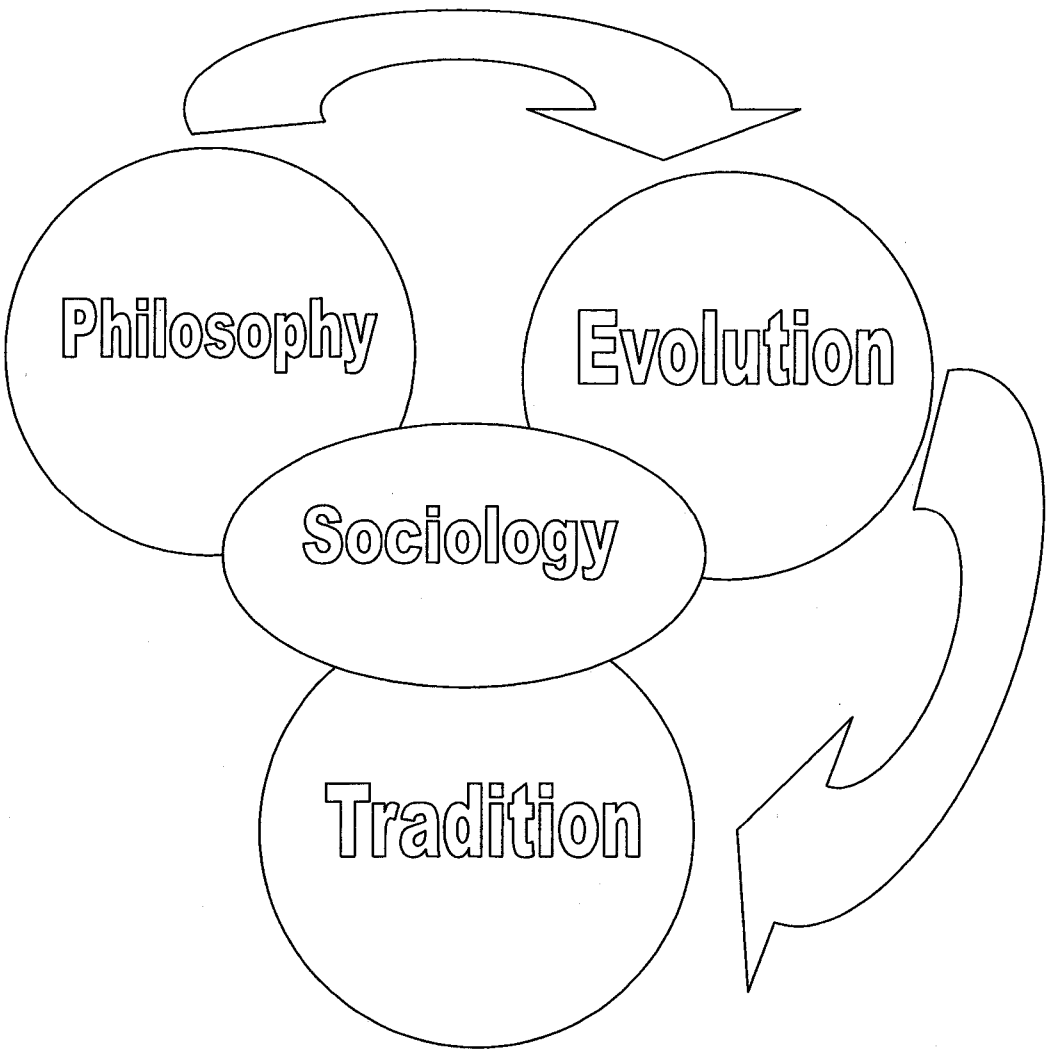

Figure 1. Illustration of Cardozo's four sources of information and their relationships.

The *Method of Philosophy* is best explained by the use of legal precedents. Roberts systematically compared and contrasted the First Amendment claims argued by FAIR with the legal precedents that addressed each claim. The comparing and contrasting resulted in Roberts providing an interpretation of the legal precedents that did not deviate from the historical development of the precedent. Following the *Method of Philosophy* is the second source of information offered by Cardozo in his judicial decision-making template – *Evolution.*

The *Method of Evolution* examines a line of historical development of a principle. In this decision, Roberts did not evolve the interpretation of precedent beyond what was established by their histories and stated, "...FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."[728] Chief Justice Roberts also stated that FAIR "...plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents."[729]

Roberts also utilized the *Method of Tradition* in this decision by supporting the traditions and customs of the military and military affairs. The decision in this case affirmed the cause and mission of the military and its recruitment activities at college and university campuses. This researcher believes that the customs of the military and the customs of (law schools) higher education institutions are more similar than different. Both entities are elite organizations that are outside of the mainstream. Both entities have unique environments and wish to control those environments without outsider influence.

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[728] Opinion of the Court, No. 04-1152, 20.

[729] Opinion of the Court, No. 04-1152, 20.

Each entity seeks to create an environment that is conducive to inculcating its members with the traditions, culture, and practices of the entity. Both entities participate in forms of discrimination to select and enlist those individuals it thinks will benefit from the education provided and be beneficial to the entity. Each entity seeks to keep morale high by insulating their members from what it perceives as negative influences. Each entity has strict rules concerning behavior and unique personnel policies to manage its members. Both the military and higher education institutions (law schools) make strategic decisions about how to make their members successful in their personal pursuits, and become a positive reflection on the institution when in the mainstream public. In this case, the customs and traditions of these two entities, which have both received deference from the Supreme Court of the United States, were pitted against each other, and the customs and traditions of the military were successful.

The relationship between higher education and the government is symbiotic where each other's existence relies heavily on the other. Most college and universities could not exist without funding from the federal government, and the federal government would not be able to function without the personnel trained and educated at colleges and universities. The military does not have the infrastructure to educate and train lawyers, and that is why they rely on law schools to supply its ranks with educated qualified personnel.

The *Method of Sociology* balances and moderates the other sources of information in the judicial decision-making process and is based on the principle of social justice. Analyzing this decision through the lens of sociology and its overarching pursuit of welfare of society reveals some interesting information. This lawsuit was brought by

FAIR, a coalition of twenty-five law schools. FAIR framed the litigation from the perspective of law schools and argued that the Solomon Amendment, which was directed at higher education institutions, infringed on the law schools Constitutional and First Amendment rights.

FAIR argued that law schools should have the right to enforce their nondiscrimination policies without the interference of the federal government. The policies of the law schools were not the policies of the parent organization, and FAIR did not attempt to argue this case from the perspective of the parent organization. There seemed to be little concern about the effect the litigation would have on the parent organization until the law was amended and clarified to include the parent institution and its subelements. The case documents clearly identify that the fight was from the law school members of FAIR not parent institutions of higher education.

Of the twenty-five member law schools in FAIR during this litigation only nine parent organizations participated in the case as Amici. One could speculate that litigation that jeopardized federal funding to an institution of higher education would garner more support from higher education institutions. However, there was very little support from parent organizations. Only nine parent organizations participated as Amici, and all nine institutions were private higher education institutions.

Applying the *Method of Sociology* and its pursuit of law for the welfare of society, the Supreme Court decision had to rule in favor of the military. FAIR and its members cannot be considered representative of the American mainstream. Balancing the desire to enforce nondiscrimination policies against the desire to recruit military

personnel to support an all-volunteer military would not result in the pursuit of law for the welfare of society at large.

Viewing this decision through the lens of *Sociology* of the parent institution, the Court has provided parent organizations with a tool that could and should be used to create more communication and management of law schools. This decision from the Court should be seen as a call to parent organizations and law schools that collaboration is needed and the development of policies should reflect the vision, mission, and goals of the higher education institution as a whole, not just the silo view of one of its members.

The Amicus brief of Columbia University, Cornell University, Harvard University, New York University, The University of Chicago, The University of Pennsylvania, and Yale University stated that the relationship between institutions of higher education and the federal government is "ubiquitous and indispensable."[730] This view should be adopted by the law schools in developing policies and procedures for operations within the parent organization. The relationship between the parent organization and the law schools should be ubiquitous and indispensible.

Jeffrey Rosen presents a theory that the Supreme Court follows majority will in their decision making and is not the counter majoritarian entity that protects the minority from the majority. Like the *Method of Sociology* offered by Cardozo, Rosen's theory rests on the Court making decisions that supports the majority and majority will. Analyzing the decision to determine if it supports or refutes the theory presented by

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[730] Brief of *Amicus Curiae* Columbia University, Cornell University, Harvard University, New York University, The University of Chicago, The University of Pennsylvania, and Yale University, 13, http://www.law.georgetown.edu/solomon/documents/FAIRamicusColumbia.pdf (accessed August 10, 2007)

Rosen, results in an affirmative decision. This decision supports Rosen's theory that the Court follows majority will which according to his theory is represented by Congress and Congressional will. Congress overwhelming supported the Solomon Amendment and all of its revisions/amendments.

The voting record of the House of Representative identifies that the original amendment offered by Representative Solomon (H.R. 4301) was passed by a vote of 271 ayes and 126 noes.[731] The number of aye votes more than doubled the vote of the noes. The Senate Vote on S. 2182 resulted in 80 yeas and 18 noes for a four to one margin of victory.[732] The next amendment (H.R. 3610) received 278 ayes and 126 noes.[733] Again, a more than two to one margin of victory. The Senate vote on H.R. 3610 resulted in 72 ayes and 27 noes.[734] H.R. 4200 was passed by the House of Representatives by a vote of 391 ayes and 34 noes.[735] This amendment was passed by the Senate by "unanimous consent."[736] Applying Rosen's theory that Congress is an indicator of majority will, the voting record in this case supports the theory presented by Rosen.

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[731] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3865.

[732] U.S. Senate Roll Call Votes 103rd Congress - 2nd Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00297 (accessed August 14, 2007)

[733] 104 Cong. Rec., 104 Cong. 2d sess., Message from the House (Senate - June 14, 1996) : S6303

[734] H.R. 3610, http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03610:@@@R (accessed August 17, 2007)

[735] Final Vote Results for Roll Call 206, http://clerk.house.gov/evs/2004/roll206.xml (accessed August 27, 2007)

[736] H.R. 4200 - To authorize appropriations for fiscal year 2005 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe personnel strengths for such fiscal year for the Armed Forces, and for other purposes. http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR04200:@@@S|TOM:/bss/d108query.html (accessed August 27, 2007)

Because of the singular view and framing of this lawsuit, the affect on college and university policies and procedures should be minimal. The policies of the parent organizations were not the issue of the lawsuit. The policies of the parent organization will be unchanged as it relates to military recruiters on the parent campus. The policies and practices of law schools may change depending on the level of assistance provided prior to the decision of the Court. Law schools will be required to allow military recruiters access to their recruitment venues and provide the military recruiters with the services provided any other recruiter. This may present some problems for the campus in potentially having to deal with protesters and protecting its visitors and campus community. To address any problems the law school should work with the parent organization to develop strategies and implement policies and procedures campus wide.

Recommendations for Further Research

Recommendations for future study would include analyzing more decisions offered by Chief Justice Roberts using the judicial decision-making template offered by Judge Benjamin Cardozo. This study would provide additional support or refutation for the conclusions reached in this analysis and also provide administrators, law students, educators, and the general public with a window in understanding the decision making process of the current Chief Justice.

Utilizing Cardozo's *Method of Philosophy*, use of precedents, and *Method of Evolution*, historical development in a future quantitative study to identify the precedents used to support Constitutional arguments brought by parties in litigation would result in a better understanding of the constitutional principles these precedents cover. This study

would provide legal investigators with information on which precedents are the controlling precedents over Constitutional subject matter.

Other recommendations would be to analyze a number of Supreme Court cases against the theory provided by Rosen to provide additional support or refutation of the conclusions reached in this analysis. Rosen's theory defies conventional wisdom and teachings of the role of the Supreme Court of the United States and additional studies to investigate this theory would benefit legal scholars, faculty and students.

An interesting study would be to interview and poll deans of the member law schools of FAIR and the upper administration of their parent organizations to determine the level of communication that surrounded the desire to bring this lawsuit. Was there communication between the law schools and the parent organization? Was this truly a singular, unsupported action of law schools? After the decision from the Supreme Court, has the communication increased between the parent organization and the law schools?

An additional study could survey college undergraduate and graduate students, faculty, staff and administrators to determine if there is or was knowledge about the Solomon Amendment litigation and the resulting outcome of this litigation. As a higher education administrator pursuing a PhD in Educational Leadership as this case progressed to litigation, this researcher was amazed by the lack of recognition, debate, dialogue, and understanding of this case personally and among his cohort. This legal case jeopardized federal funding to higher education institutions, and the information surrounding it was isolated to law schools. Litigation that jeopardizes funding to an institution of higher education should be central dialogue among its administrators, faculty, staff, and students. This study could provide additional support or refutation of

this researcher claims concerning the silo nature of institutions of higher education. This study would identify the level of knowledge concerning legal topics that affect institutions of higher education.

Conclusions

This historical case study entailed in depth legal research methods as a foundation for analysis of *Rumsfeld v. FAIR*. The historical case study and legal research offered will provide legal scholars, faculty, administrators, student and the general public with a single source of information on the Solomon Amendment and the litigation that surrounded this piece of legislation. This study also entailed a micro legal analysis of the judicial decision-making style of the Chief Justice of the Supreme Court of the United States – Chief Justice Roberts. In addition, the study provided a macro analysis of the Supreme Court decision in *Rumsfeld v. FAIR* that provided support for the theory offered by Professor Jeffrey Rosen.

This study advocates for the development and advancement of policies and procedures that increases communication among the numerous professional schools and colleges to develop synergy and unity in addressing issues. Institutions of higher education are arranged and managed in silos. Professional school and colleges are silos of expertise, and this can create a myopic view of issues. The Solomon Amendment case was a challenge brought by a group of university law schools and not parent institutions. This challenge by a select group of university law schools endangered funding for parent colleges and universities. Policies should be developed to manage professional schools and colleges within an institution to insure that the institution is working as a community and not as individual units.

One of the driving factors underlying this case is the military's' employment practices regarding homosexuals. This litigation brought attention to the "Don't Ask, Don't Tell" policy, and can be used to increase communications about this topic to Congressional Representatives in an effort to repeal this legislation.[737] This litigation also brought attention to institutions of higher education and law schools and may have solidified the words of Congressman Pombo and thoughts of many that those of us in higher education are in an "Ivory Tower" out of touch and unaware of the outside world.[738] Institutions of higher education and the military are both elite institutions, however, as educators we cannot lose touch with those outside of academia because we are preparing and sending students out to that world. Institutions of higher education should prepare its students with the knowledge, skills, and abilities to fully participate in our current democracy and to be advocates for higher education.

Epilogue

On March 28, 2008 the United States Department of Defense issued a final rule in the Federal Register outlining steps to be used should an institution of higher education have a policy or practice that prohibits or prevents military recruiters' access to their campuses.[739] The final rule was drafted in consultation with several federal agencies including the Department of Education, Department of Labor, Department of Transportation, Health and Human Services, Homeland Security, Department of Energy

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[737] Statutes and Regulations, http://dont.stanford.edu/doclist.html (accessed October 1, 2007)

[738] 140 Cong. Rec., 103rd Cong., 2d sess., 1994, H3863

[739] Department of Defense 32 CFR Part 216, Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, http://edocket.access.gpo.gov/2008/E8-6536.htm (accessed April 2, 2008)

and the Central Intelligence Agency.[740] The final rule also incorporated the comments submitted by institutions of higher education and individuals that responded to the publication of the proposed rule on May 7, 2007.[741]

The final rule specifies if a Department of Defense component believes there is an institution of higher education that has policies or practices that are prohibiting or preventing military recruiter access, they are required to confirm the policy with consultation with the institution. Following this consultation if it is determined that the policy or practice triggers a denial of funding under the Solomon Amendment the facts of the policy are forwarded to the Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD(P&R).[742] The PDUSD(P&R), after determining that the policies or practices are not in compliance with the Solomon Amendment is required to inform the head of each department and agency affected by the decision, the name(s) of the violating institution(s).[743] The PSUSD(P&R) is also required to notify the General Services Administration, the Secretary of Education, and the Committees on Armed Services of the Senate and House of Representatives.[744] The PSUSD(P&R) must then publish the names of the violating institutions in the Federal Register at least once every

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[740] Ibid

[741] Ibid

[742] Department of Defense 32 CFR Part 216, Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 16526, http://edocket.access.gpo.gov/2008/E8-6536.htm (accessed April 2, 2008)

[743] Department of Defense 32 CFR Part 216, Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 16527, http://edocket.access.gpo.gov/2008/E8-6536.htm (accessed April 2, 2008)

[744] Ibid

six months, and inform the institution(s) that funding may be restored if information is provided that establishes that the violating policy or practice no longer exists.[745]

Following a determination from the PSUSD(P&R) the Federal department and agencies affected by the decision are required to determine what funds provided by their agency or department are provided to the violating institution of higher education and take the required actions to prohibit these funds. The final rule does not identify the specific funds associated with each Federal department or agency-only the names of the specific Federal departments and agencies. It is the responsibility of the Federal department and agency to identify the specific funds covered under grants or contracts to a specific institution of higher education.[746]

Within 45 days after receipt of information from the institution of higher education that has been prohibited funding under the Solomon Amendment, the PDUSD(P&R) must make a determination to continue the funding prohibition or restore funding. The PDUSD(P&R) must then notify the affected institution of higher education, each federal department or agency affected, and the General Services Administration of the decision and change in funding eligibility.[747]

The final rule provides clear steps for the DoD and institutions of higher education in addressing the Solomon Amendment requirements. The rule requires communication between the DoD and an institution of higher education to confirm that a policy or practice of the institution of higher education prohibits or prevents military

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[745] Ibid

[746] Ibid

[747] Ibid

recruiters access. After this consultation, should a determination be made that an institution of higher education has policies or practices that prohibit or prevents military recruiters access, the rule provides the actions to be taken by the DoD. The rule also provides timelines for the restoration of federal funds after an institution of higher education provides information that the policy or practice that prevented military recruiters access no longer exists.

Based on the research presented in this dissertation, the final rule is consistent with the ruling from the Supreme Court and the Solomon Amendment legislation. The rule establishes a mechanism and process for establishing a violation of the Solomon Amendment requirements, addressing the violation, and the restoration of federal funding following a determination that the policy or practice that prevented military recruiters access no longer exists.

Table of Authorities

Constitutional Provisions and Statutes

Cases

Rust v. Sullivan, 500 U.S. 173 (1991)

Speiser v. Randall, 357 U.S. 513 (1958)

South Dakota v. Dole 483 U.S. 203 (1987)

United States v. American Library Association, Inc., 539 U.S. 194 (2003)

Wooley v. Maynard, 430 U.S. 705 (1977)

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